Columbia College Chicago *and* Part-Time Faculty Association At Columbia College Chicago—IEA/NEA. Cases 13–CA–073486, 13–CA–073487, 13–CA–076794, 13–CA–078080, 13–CA–081162, 13–CA–084369

March 24, 2016

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

On March 15, 2013, Administrative Law Judge Geoffrey Carter issued the attached decision. The General Counsel, the Respondent, and the Charging Party Union each filed exceptions, a supporting brief, and an answering brief. The Respondent also filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.[2]

We agree with the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union from February to May 2012 about the effects of its decision to reduce the number of credit hours awarded for certain courses and by setting unlawful preconditions to bargaining.[3] We also agree with the judge's finding that the Respondent engaged in overall bad-faith bargaining.[4] In addition, in the absence of exceptions, we adopt the judge's findings that the Respondent: (1) violated Section 8(a)(5) and (1) by failing to meet and bargain with the Union for a successor agreement from February to June 2012; (2) further violated Section 8(a)(5) and (1) by failing and refusing to provide the Union with requested information regarding the Respondent's Early Feedback System, class assignments to part-time faculty in the photography department, and the investigation of Union President Diana Vallera for misconduct; (3) violated Section 8(a)(3) and (1) by notifying employee Diana Vallera that disciplinary action was forthcoming because of her protected statements about alleged surveillance at her home and by not assigning Vallera more than one class section for the Fall 2012 semester;[5] and (4) violated Section 8(a)(1) by maintaining an overbroad work rule.

Below, we address two issues in detail. First, we explain our conclusion that, contrary to the view of our dissenting colleague, the Respondent unlawfully failed to

[1] The Respondent and the Union have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] As explained below, we shall modify the judge's recommended Order to require the Respondent to reimburse the Union for all bargaining costs it incurred due to the Respondent's unlawful conduct. In accordance with *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), and *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall further modify the judge's Order to require the Respondent to compensate the discriminatees for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file reports with the Regional Director for Region 13 allocating the backpay awards to the appropriate calendar quarters. We shall further modify the judge's recommended Order to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

[3] We find it unnecessary, however, to rely on his statement that the Respondent's bargaining proposal to add an express effects-bargaining waiver to the contract demonstrated that the existing collective-bargaining agreement did not contain such a waiver. We also do not rely on his finding that the Respondent's violations "precluded" meaningful effects bargaining.

In its Brief in Support of Exceptions, the Respondent argues, briefly and for the first time, that requiring it to bargain over course credit-hour changes is an infringement of its First Amendment right to academic freedom. As the Respondent did not raise this argument to the judge, we deem it to be untimely raised and thus waived. See *Smoke House Restaurant*, 347 NLRB 192, 195 (2006), enfd. 325 Fed.Appx. 577 (9th Cir. 2009).

[4] The Respondent's only specific exception to the bad-faith bargaining violation is its exception to the judge's Conclusion of Law #9. The Respondent, however, does not state, either in its exceptions or supporting brief, the grounds on which the judge's conclusion should be overturned. Therefore, in accordance with Sec. 102.46(b)(2) of the Board's Rules and Regulations, we disregard this exception. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

[5] We also adopt, for the reasons stated by the judge, his dismissal of allegations that the Respondent violated Sec. 8(a)(3), (4), and (1) by failing to assign Vallera any classes during the 2012 summer semester and Sec. 8(a)(5) and (1) by unilaterally changing the scope of the bargaining unit and repudiating the grievance procedure contained in the collective-bargaining agreement. There are no exceptions to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) by selectively applying a work rule only against employees who support unions; Sec. 8(a)(3), (4), and (1) by investigating Vallera for misconduct; and Sec. 8(a)(5) and (1) by failing to bargain over the effects of "prioritization."

Member Hirozawa finds it unnecessary to pass on whether the Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing the scope of the bargaining unit to include only those part-time faculty members currently teaching a course. The additional violation would not materially affect the remedy, which will require the Respondent to bargain with the Union as the exclusive collective-bargaining representative of the employees in the certified unit, which consists of "all part-time faculty members who have completed teaching at least one semester at [the Respondent]."

bargain over the effects of its credit-hour reductions. Second, we explain why we find, in disagreement with the judge and our dissenting colleague, that an award of negotiation expenses to the Union is an appropriate remedy for the Respondent's bargaining-related misconduct.

I.

The Respondent operates a private college that specializes in arts, communication, and media in Chicago, Illinois. Since 1998, the Union has served as the exclusive collective-bargaining representative of part-time faculty members. At all relevant times, the Union and the Respondent were parties to a collective-bargaining agreement (CBA).[6] The CBA contained a management-rights clause in which the Respondent retained "all [its] rights, responsibilities, powers, duties, and authority inherent in the management of the College."[7] Article XI of the CBA set forth a salary schedule that "represents minimum compensation" for instructors teaching a three credit-hour course, and provided that compensation for courses totaling other than three credits would be prorated accordingly.

At some point in 2010 or 2011, the Respondent decided to reduce the number of credit hours for 10 courses, with the changes to take effect in the 2011–2012 school year. The Union requested bargaining over the effects of these changes, but, from February 21, 2012, until May 4, 2012, the Respondent refused to engage in such bargaining unless the Union first provided a proposal regarding the effects and a list of unit employees affected by the changes. On those facts, the judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) of the Act in two related respects: first, by failing to bargain with the Union from February to May 2012 over the effects of its decision to reduce credit hours for certain courses; and, second, by setting unlawful preconditions to such bargaining.[8]

Our dissenting colleague argues that the Respondent had no duty to bargain over the effects of course credit-hour reductions for three reasons: (1) under *Fresno Bee*, 339 NLRB 1214 (2003), any effects of the Respondent's decision were the inevitable consequence of a permissible managerial decision; (2) the CBA between the parties "covered" the dispute; and (3) the Union clearly and unmistakably waived its right to bargain over the effects of the Respondent's change. We reject each of these arguments.

A. The Effects Were Not the Inevitable Consequence of a Permissible Managerial Decision

In *Fresno Bee*, 339 NLRB 1214 (2003), the Board rejected the employer's argument that it was privileged to make unilateral changes to employees' working conditions that it claimed were the "inevitable consequences" of a permissible managerial decision. Id. at 1214. The Board stated that, for an employer to successfully assert such a defense, "the employer must show not only that the change resulted directly from that decision, but also that there was no possibility of an alternative change in terms of employment that would have warranted bargaining." Id. at 1214–1215, citing *Holly Farms Corp. v. NLRB*, 48 F.3d 1360, 1368 (4th Cir. 1995), cert. granted on other grounds 516 U.S. 963 (1995), affd. 517 U.S. 392 (1996); see also *Good Samaritan Hospital*, 335 NLRB 901, 903–904 (2001), review dismissed pursuant to agreement 2002 WL 31016553 (D.C. Cir. 2002).[9] As the *Fresno Bee* Board explained, "in most situations '[t]here are alternatives that an employer and a union can explore to avoid or reduce the scope of the [change at issue] without calling into question the employer's underlying decision.'" 339 NLRB at 1214 (brackets in original), quoting *Bridon Cordage*, 329 NLRB 258, 259 (1999).

Relying on *Fresno Bee*, our dissenting colleague argues that the "*effects* of the College's lawful decision to reduce course credit hours resulted *directly* from that decision, and there was no possibility of an alternative change because all such effects *were compelled by the CBA*." We disagree.

The Respondent bears the burden of showing that any unilateral changes that resulted directly from a permissible managerial decision were privileged and not subject to notice and bargaining with the Union. However, the Respondent itself has not argued that all of the effects of its managerial decision to change credit hours for certain courses were the inevitable consequences of that decision. Moreover, our colleague's reliance on this argu-

[6] The CBA's effective dates ran from 2006 to 2010, but the parties agreed to continue the agreement's terms while they negotiated a successor agreement.

[7] The CBA further declared that these rights and responsibilities included:

> The right to plan, establish, terminate, modify, and implement all aspects of educational policies and practices, including curricula; admission and graduation requirements and standards; scheduling; academic calendar; student discipline; and the establishment, expansion, subcontracting, reduction, modification, alteration, combination, or transfer of any job, department, program, course, institute, or other academic or non-academic activity and the staffing of the activity, except as may be modified by this Agreement.

[8] There is no dispute that the management-rights clause gave the Respondent the right to unilaterally change course credit hours.

[9] Notably, instead of finding that any of the changes at issue in *Fresno Bee* were the inevitable consequence of a permissible managerial decision, the Board found that, in fact, they "were the effects of that decision, and as such, were mandatory subjects of bargaining." 339 NLRB at 1215.

ment is misplaced because the Respondent has not established that, even if all of the effects of the credit-hour reductions resulted directly from its decision to make those reductions,[10] there was no possibility of alternative changes in terms of employment that would have warranted bargaining. See *Fresno Bee* at 1214–1215.

Specifically, we reject our dissenting colleague's assertion that all effects of the Respondent's decision were compelled by the CBA. For example, although Article XI of the CBA set forth salary levels for teaching a three-credit course (and provides that compensation for courses totaling other than three credits shall be prorated accordingly), the salary levels listed represented only the "minimum compensation." There was nothing in Article XI, or elsewhere in the CBA, that precluded the Respondent from exploring different levels of compensation with respect to any individual course, including the courses affected by the Respondent's decision to reduce credit hours. We provide this example simply to show that the CBA did not automatically dictate all effects of the Respondent's decision. There may have been other bargainable effects and alternatives as well, perhaps even ones that the parties themselves did not perceive immediately. See *Good Samaritan*, above, 335 NLRB at 903 ("Uncertainty as to the possible effects of policy changes is not unusual, particularly before the parties explore the issue through bargaining. Moreover, the obligation to provide the Union with notice and an opportunity to bargain about effects is not conditioned on the view of the judge or the Board as to what, if any, effects will be identified or how they will be resolved by the parties.").[11]

Accordingly, the Respondent failed to fulfill its statutory obligation to engage in effects bargaining. See *Holly Farms Corp. v. NLRB*, 48 F.3d 1360, 1368; *Fresno Bee,* 339 NLRB at 1215; *Good Samaritan*, 335 NLRB at 904.

B. The Board Does Not Apply the "Contract Coverage" Standard

We also reject our dissenting colleague's argument that the Respondent had no duty to bargain over the effects of its decision to change course credit hours under the contract-coverage test endorsed by the District of Columbia Circuit and the Seventh Circuit. The Board has declined to adopt the contract-coverage standard and instead has consistently applied the "clear and unmistakable" waiver standard. See *Provena St. Joseph Medical Center,* 350 NLRB 808 (2007); see also *Columbia College Chicago*, 360 NLRB No. 122 (2014), slip op. at 2 fn. 8.

C. The Union Did Not Clearly and Unmistakably Waive Its Right to Bargain Over the Effects of the Course Credit-Hour Changes

Our colleague's final argument, that the Union clearly and unmistakably waived bargaining over the effects of the Respondent's decision to change course credit hours, is premised on his view that every effect, including those specifically identified by the Union, was controlled by the terms of the CBA. We disagree with this premise and decline to prejudge the results of bargaining. *Good Samaritan*, above, 335 NLRB at 903. Instead, as discussed above, we find that the CBA did not inevitably dictate the effects of the Respondent's decision. Accordingly, we reject our dissenting colleague's assertion that the Union clearly and unmistakably waived bargaining over the effects of the Respondent's decision.[12]

II.

We turn now to the appropriate remedy. In addition to the Board's traditional remedies, the General Counsel and the Union requested a variety of measures to remedy the effects of the Respondent's misconduct. The judge, however, denied all of their requests, including the General Counsel's request for a bargaining schedule and the Union's requests for reimbursement of its negotiation and litigation expenses and for the imposition of a broad cease-and-desist order. The General Counsel and the Union, respectively, now except to the judge's denial of those particular remedies. For the reasons discussed below, we find merit in the Union's exception regarding reimbursement of its negotiation expenses, and we shall provide this relief to fully remedy the Respondent's unfair labor practices.[13]

[10] As the Board explained in *Fresno Bee*, "[a]rguably, the effect on terms of employment of any managerial decision could be said to have resulted 'directly' from that decision. To find that such an effect is excused from the Act's notice and bargaining requirement, simply because it resulted directly from a nonbargainable managerial decision, would undermine the effects bargaining requirement." 339 NLRB at 1215 fn. 3.

[11] Although the parties' briefs identified changes to an instructor's compensation and to certain benefits as possible effects, it appears that the change to course credit hours could have affected other terms and conditions of employment, such as the maximum number of courses instructors were allowed to teach. Again, effects bargaining would have given the parties an opportunity to explore such possibilities.

[12] In addition, we agree with the judge that the Union did not otherwise waive its right to bargain.

[13] We agree with the judge, for the reasons he stated, that reimbursement of the Union's litigation expenses and a broad cease-and-desist order are not warranted in this case. In the particular circumstances of this case, we also decline the General Counsel's request that we impose a bargaining schedule as a remedy. We note that the parties resumed face-to-face negotiations in June 2012, and we are satisfied that requiring the Respondent to reimburse the Union for past negotiating expenses is sufficient to ensure the Respondent's compliance with our bargaining order.

In *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995), enfd. in relevant part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997), the Board held that,

> [i]n cases of unusually aggravated misconduct, . . . where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their "effects cannot be eliminated by the application of traditional remedies," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969), citing *NLRB v. Logan Packing Co.*, 386 F.2d 562, 570 (4th Cir. 1967), an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table. . . . [T]his approach reflects the direct causal relationship between the respondent's actions in bargaining and the charging party's losses.[14]

Applying these principles, we find, contrary to our dissenting colleague, that the Respondent's unfair labor practices fully warrant reimbursement of the Union's negotiation expenses incurred from March 31, 2011, until June 13, 2012, in connection with Case 13–CA–078080 (covering the parties' bargaining for a successor agreement), and from February 21, 2012, to May 4, 2012, in connection with Case 13–CA–073487 (covering bargaining over the effects of the course credit-hour changes). In addition to relying on the unfair labor practices committed by the Respondent, we base this finding on the following considerations.[15]

A. Without Explanation, the Respondent Reopened Bargaining Issues Long Deemed "Not In Dispute"

The Respondent and the Union began negotiations for a successor collective-bargaining agreement in January 2010. For over a year, the parties engaged in productive bargaining sessions, exchanging proposals and nearly reaching agreement on numerous issues.[16] On March 30, 2011, the Respondent submitted a comprehensive contract proposal, which served as the basis of further bargaining in sessions held over the next 6 months.

The Respondent's posture towards the negotiations changed, however, in the fall of 2011.[17] On September 30, the Regional Director for Region 30 issued a complaint against the Respondent in Case 30–CA–018888, alleging that it had been committing various unfair labor practices since December 2010.[18] The Respondent received a copy of the complaint on October 6. The very next day, when the parties met for a bargaining session, the Respondent informed the Union that it was resubmitting its March 30 contract proposal, discarding all NIDs that had been reached in the meantime unless they were consistent with the March 30 proposal.

The Respondent offered no explanation for why it was discarding over 6 months of productive bargaining and forcing the Union to renegotiate language that the Respondent had previously agreed was not in dispute. As found by the judge, the Respondent simply submitted regressive bargaining proposals in direct retaliation for the Union engaging in protected activity.

The parties met again on October 28, but no negotiations took place because the parties could not agree on the format of future negotiations sessions. The Respondent subsequently informed the Union that it was preparing a new comprehensive proposal and that it did not "see the need to meet" until the proposal was ready and the Union had reviewed it.

The Respondent sent its "new" comprehensive proposal on December 19. This proposal, however, was essentially the same as the Respondent's March 30 proposal, with the same regressive provisions. As found by the judge, the proposal modified or eliminated virtually all NIDs (see fn. 16) that were not consistent with the Respondent's March 30 proposal, including eliminating the requirement that disciplinary action be based on just

[14] Although the Board in *Frontier Hotel & Casino* expressed its intention to "rely[] on bargaining orders to remedy the vast majority of bad-faith bargaining violations," 318 NLRB at 859, it did not set the bar for an award of negotiating expenses at the level of misconduct in that case. Nor, contrary to our colleague's suggestion, have subsequent cases set a threshold level of egregiousness that must be satisfied in order to conclude that an employer's conduct infected the core of the bargaining process. Rather, our decisions make clear that, in determining whether to award negotiating expenses, we will consider each case on its own merits, evaluating the effect of the violation on the wronged party and the injury to the collective-bargaining process. See *Barstow Community Hospital*, 361 NLRB No. 34, slip op. at 5 fn. 13 (2014); *Fallbrook Hospital*, 360 NLRB No. 73, slip op. at 3 (2014), enfd. 785 F.3d 729 (D.C. Cir. 2015); *Camelot Terrace*, 357 NLRB 1934, 1937 (2011).

[15] The judge relied on much of the conduct we describe below to find that the Respondent engaged in overall bad-faith bargaining.

[16] The parties termed these issues "not in dispute" (NID), meaning that the language was not in dispute, but that further bargaining might occur.

[17] All dates are in 2011 unless otherwise indicated.

[18] The complaint alleged, among other things, that the Respondent had failed and refused to bargain with the Union over the effects of a change the Respondent announced and subsequently implemented limiting the initial number of courses that bargaining-unit members could be assigned to teach each semester, and that the Respondent had failed to provide requested relevant information on two occasions. The Board found those violations. See *Columbia College*, 360 NLRB No. 122 (2014). As we explain below, the present case chronicles a continuation of the Respondent's failures to meet its statutory bargaining obligations.

cause. Again, the Respondent offered no explanation for why it eliminated previously agreed-upon items.

By repeatedly reopening "not in dispute" issues without any justification, the Respondent forced the Union to expend resources bargaining anew on those items—resources that could have been devoted to addressing open items.

B. The Respondent Imposed Unlawful Preconditions to Bargaining

On February 13, 2012, the Union requested that the Respondent provide available dates for face-to-face bargaining sessions. The Respondent answered, not by providing dates, but by demanding that the Union either provide the Respondent with comments about its December 19 proposal or make a counterproposal before it would resume face-to-face negotiations. This state of affairs continued for approximately 4 months, with the Union requesting face-to-face bargaining sessions and the Respondent refusing to meet unless and until the Union replied to its proposal or presented its own counterproposal. As found by the judge, the requirement that the Union respond to the December 19 proposal or submit its own proposals before the Respondent would meet face-to-face was an unlawful precondition to bargaining.

Similarly, the Respondent unlawfully conditioned bargaining over the effects of the course credit-hour changes. As explained in the judge's decision, in response to the Union's request that the Respondent bargain over those effects, the Respondent asserted that it did not believe it had an obligation to bargain with the Union but that it was willing to meet to "discuss" the issue if the Union first gave the Respondent a proposal regarding the effects and a list of the union members affected by the changes. The Respondent maintained this position for several months before eventually agreeing to meet to discuss the changes. Our decision today adopts the judge's finding that the Respondent's actions with respect to effects bargaining were also unlawful.[19]

The Respondent's repeated imposition of unlawful preconditions to bargaining forced the Union to expend time and energy just getting the Respondent to the table. In addition, the Respondent's unlawful conduct plainly delayed bargaining for both a successor collective-bargaining agreement and a resolution of the effects of the course credit-hour changes. The resulting unnecessary expenditures and delays inevitably diminished the Union's bargaining strength with respect to both issues. Cf. *Frontier Hotel & Casino*, supra, 318 NLRB at 858 & 858 fn. 5.

C. The Respondent Made Proposals That Would Have Left the Union With Less Than the Act Provides

The existing collective-bargaining agreement gave the Respondent the right to make decisions regarding a wide range of terms and conditions of employment. The Respondent, however, sought to obtain an even broader waiver during negotiations for the successor agreement, insisting throughout negotiations that the Union agree to contract language that would also waive the Union's right to bargain over the *effects* of the Respondent's decisions, despite the Union's consistent opposition. Absent a contract, the Act itself would require the Respondent to notify and bargain with the Union about the effects of any changes that it wished to make to the terms and conditions of employment of bargaining unit members. The Respondent thus was insisting on a waiver that would have granted it unfettered control and left bargaining-unit employees with fewer rights and less protection than they would have under the Act without a contract. Such conduct shows that the Respondent was trying to frustrate the collective-bargaining process and undermine the Union's representative role as envisioned by the statute.[20] See *A-1 King Size Sandwiches*, 265 NLRB 850, 859–861 (1982), enfd. 732 F.2d 872, 877 (11th Cir. 1984).

D. The Respondent's Misconduct at the Table was Exacerbated by Its Conduct Away from the Table

In addition to its bad-faith conduct at the negotiating table, the Respondent committed other violations that also served to dissipate the Union's strength and resources. Thus, the Respondent unlawfully failed to provide the Union with requested information on three occasions and retaliated against Union President Diana Vallera for her aggressive union advocacy. These unfair labor practices tainted the parties' relationship and predictably undermined both the Union's leverage in bargaining and its support among employees.

. . .

In sum, the Respondent engaged in "unusually aggravated misconduct . . . where it may fairly be said that . . . substantial unfair labor practices have infected the core of a bargaining process to such an extent that their 'effects cannot be eliminated by the application of tradition-

[19] Similarly, as noted, the Respondent had been unlawfully asserting since December 2010 that it had no obligation to bargain with the Union over the effects of changes to its course-scheduling process for part-time faculty and refusing to meet to discuss those changes. See *Columbia College Chicago*, 360 NLRB No. 122 (2014).

[20] We do not find that the Respondent's proposal of an effects-bargaining waiver was itself unlawful or otherwise pass on the merits of the Respondent's bargaining proposals, as our dissenting colleague suggests. Rather, considered in the context of the parties' negotiations as a whole, including the Respondent's unfair labor practices, the proposal supports our conclusion that the Respondent deliberately acted to prevent any meaningful progress during bargaining.

al remedies.'" *Frontier Hotel*, supra, 318 NLRB at 859. In these circumstances, we find that only by ordering the reimbursement of the Union's negotiating expenses[21] can we reasonably restore the Union's previous financial strength and consequent ability to carry out effectively its responsibilities as the employees' representative.

ORDER

The National Labor Relations Board orders that the Respondent, Columbia College Chicago, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Part-Time Faculty Association at Columbia (the Union) as the exclusive collective-bargaining representative of employees in the bargaining unit.

(b) Setting unlawful preconditions that the Union must satisfy before it will engage in face-to-face bargaining or effects bargaining.

(c) Failing and refusing to bargain with the Union about the effects of its decision to reduce the number of credit hours awarded for the following 10 courses: Accounting; Screenwriting Workshop; Adaptation in LA; Acquiring Intellectual Property/LA; Theory, Harmony & Analysis I; Theory, Harmony & Analysis II; Directing I; Pro Survival & How to Audition; Local Government Politics Seminar; and State and National Government Politics Seminar.

(d) Refusing to bargain collectively with the Union by failing and refusing to furnish it, or unreasonably delaying in furnishing it, with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(e) Maintaining Rule 5.1 in its Network and Computer Use Policy.

(f) Notifying employees that they face forthcoming disciplinary action because they engaged in protected activity.

(g) Discriminating against employees in teaching assignments because they engaged in protected activity.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> [A]ll part-time faculty members who have completed teaching at least one semester at Columbia College Chicago, excluding all other employees, full-time faculty, artists-in-residence, and Columbia College Chicago graduate students, part-time faculty members teaching only continuing education, music lessons to individual students or book and paper making classes, Columbia College Chicago full-time staff members, teachers employed by Erickson Institute, the YMCA or Adler Planetarium, and other individuals not appearing on the Columbia College Chicago payroll, managers and confidential employees, guards, and supervisors as defined in the Act.

(b) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit concerning the effects of the Respondent's decision to reduce the number of credit hours awarded for the following 10 courses: Accounting; Screenwriting Workshop; Adaptation in LA; Acquiring Intellectual Property/LA; Theory, Harmony & Analysis I; Theory, Harmony & Analysis II; Directing I; Pro Survival & How to Audition; Local Government Politics Seminar; and State and National Government Politics Seminar.

(c) Make any unit members who taught the 10 courses listed above whole for any loss of earnings and other benefits suffered as a result of the Respondent's failure to engage in effects bargaining, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Make Diana Vallera whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the notification to Diana Vallera that the Respondent was contemplating disciplining her for engaging in protected activity, and within 3 days thereafter, notify her in writing that this

[21] As discussed above, the Respondent discarded over 6 months of productive bargaining by reneging on the parties' tentative agreements without any justification and resubmitting its March 30, 2011 contract proposal on October 7, 2011. As in *Barstow Community Hospital*, the Respondent "directly caused the Union to waste its resources in futile bargaining." 361 NLRB No. 34, slip op. at 4. In order to make the Union whole for the resources that were lost as a result of the Respondent's conduct, we shall order reimbursement of expenses in connection with case 13–CA–078080 from March 31, 2011, to June 13, 2012, the date the Respondent agreed to continue bargaining with the Union. In connection with case 13–CA–073487, we order reimbursement for the time period during which the Respondent failed to bargain: February 21, 2012, to May 4, 2012.

has been done and that the notification will not be used against her in any way.

(f) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Regional Director of Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(g) To the extent it has not already done so, furnish to the Union in a timely manner the information requested in the following information requests: December 20, 2011 (Early Feedback System); May 13, 2012 (Fall 2012 faculty class assignments); and May 17, 2012 (investigation of Diana Vallera for misconduct).

(h) Within 14 days of the Board's Order, rescind Rule 5.1 in its Network and Computer Use Policy.

(i) Furnish all current employees with written notice that Rule 5.1 in the Network and Computer Use Policy has been rescinded or with a revised policy that does not contain the unlawful rule or that provides a lawfully worded rule.

(j) Reimburse the Union for all costs and expenses, including salaries, incurred in collective-bargaining negotiations from March 31, 2011, to June 13, 2012, in connection with case 13–CA–078080 and from February 21, 2012, to May 4, 2012, in connection with Case 13–CA–073487.

(k) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(l) Within 14 days after service by the Region, post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2011.

(m) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 24, 2016

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

Columbia College Chicago (the College) is a private college focusing on media, communications, and the arts. The Part-Time Faculty Association at Columbia College Chicago, IEA–NEA (the Union) is the bargaining representative of the College's part-time faculty members. At all times relevant to this proceeding, the College and the Union were parties to a collective-bargaining agreement ("CBA").[1] Effective fall semester 2011, the College decided to reduce the number of credit hours for 12 courses.[2] It is undisputed that the management-rights clause of the CBA granted the College the right to *decide* to change the number of credit hours carried by a course without bargaining with the Union.[3]

The main question presented here is whether the College was obligated to give the Union notice and oppor-

[22] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] By its terms the CBA was effective from 2006 through 2010, but the parties mutually agreed to extend it while they engaged in negotiations for a successor agreement.

[2] In the same semester, the College also *increased* the number of credit hours for 11 courses.

[3] The judge found that the CBA "allowed the College to retain its right to make decisions about its educational, fiscal and employment policies." There are no exceptions to this finding.

tunity to bargain concerning the *effects* of the credit-hour reductions. As I explain below, I believe the correct answer to this question is no, and I would arrive at that answer under any of three distinct rationales.

First, under *Fresno Bee*, 339 NLRB 1214 (2003), I believe the College had no duty to bargain over the effects of course credit-hour reductions because any effects were the inevitable consequences of a permissible managerial decision.

Second, under the "contract coverage" standard applied by the D.C. and Seventh Circuits, I believe the College had no duty to bargain over the decision to reduce course credit hours or the effects of that decision because the parties' CBA "covered" the matter in dispute. I believe the language in the CBA—specifically, Article II, "Management Rights"—demonstrates that the parties had *already* bargained and had agreed that the College had the right to make the decision at issue here, and neither the CBA nor the parties' bargaining history evidences that the College and the Union intended to treat the effects of such a decision separately from the decision itself.

Third, even applying the Board's "clear and unmistakable waiver" standard, I believe the College had no duty to bargain over the effects of its decision to change course credit hours. The Union clearly waived bargaining over the effects of that decision, since every effect the Union has identified as an issue about which it sought bargaining was *controlled by the terms of the CBA*. For example, the Union identifies the impact of course credit-hour reductions on salary as an effect about which it wished to bargain. However, the CBA expressly linked credit hours to salary and thus created the very effect over which the Union claimed it wanted to bargain. A similar analysis applies regarding the effects of the College's decision on a variety of benefits as well. The Union waived bargaining over the effects of the College's decision to reduce course credit hours by *fixing* those effects in the CBA. The Union *claimed* it wanted to bargain over effects, but since it had already contractually agreed to those very effects, in reality it wanted the College to *modify* the CBA. Under settled law, the College was entitled to withhold its consent to a modification, and it was not obligated to bargain over this.

Two other issues in this case require resolution by the Board. In my view, because the College had no duty to bargain regarding the effects of its course credit-hour reductions, the College did not violate the Act based on an alleged "precondition" relating to effects bargaining. Finally, even assuming the Respondent committed an effects-bargaining violation, I believe it is inconsistent with Board precedent to require the College defray the Union's bargaining costs. The College's conduct can hardly be said to have "infected the core of a bargaining process to such an extent" as to warrant that extraordinary remedy.[4] Accordingly, as to these issues, I respectfully dissent.[5]

BACKGROUND

The parties' collective-bargaining agreement: Article II of the CBA, "Management Rights," provides in relevant part that the College retains the right, in its "sole discretion,"

> to plan, establish, terminate, modify, and implement all aspects of educational policies and practices, including curricula; admission and graduation requirements and standards; scheduling; academic calendar; student discipline; and the establishment, expansion, subcontracting, reduction, modification, alteration, combination, or transfer of any job, department, program, course, institute, or other academic or non-academic activity and the staffing of the activity, except as may be modified by this Agreement.

No party disputes that Article II of the CBA grants the College the right, in its "sole discretion," to decide to reduce course credit hours without giving the Union prior notice and an opportunity to bargain concerning the decision.

Under the CBA, unit employees' salary is based on two variables: the number of credit hours a course carries, and the total number of credit hours the employee teaching that course has previously taught. Regarding the first variable, article XI, "Salary," sets forth a salary schedule "for a three (3) credit hour course," and provides that "[c]ompensation for courses totaling other than three credits shall be prorated" accordingly. Regarding the second variable, article XI provides for salary increases based on the cumulative number of credit hours taught. Thus, for example, a unit employee who had taught 21 or fewer credit hours at the College would have earned $3756 for teaching a three credit hour course during the 2009–2010 academic year; a unit employee who had taught between 22 and 45 credit hours would have earned $3947; between 46 and 72 credit hours, $4175;

[4] *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995), enfd. in relevant part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997).

[5] The College did not except to the judge's findings that it violated (i) Sec. 8(a)(5) by failing to meet and bargain with the Union for several months in 2012 and failing to furnish the Union requested relevant information, (ii) Sec. 8(a)(3) by certain conduct toward Union President Diana Vallera, and (iii) Sec. 8(a)(1) by maintaining an overbroad work rule. Because there are no exceptions to these findings, they are not before the Board for our review, and the portions of the judge's decision addressing those issues are not precedential. See, e.g., *Watsonville Register-Pajaronian*, 327 NLRB 957, 959 & fn. 4 (1999).

between 73 and 111 credit hours, $4330; between 112 and 139 credit hours, $4618; and a unit employee who had taught more than 140 credit hours at the College would have earned $4770 for teaching a three credit hour course.

Other articles of the CBA similarly link various benefits to number of credit hours taught. Under Article VII, "Appointment/Reappointment," a unit employee who has "taught a minimum of 51 credit hours at the College" (and meets other specified criteria) and who loses an assigned course due to certain stated causes has the right to bump a unit employee who "has taught fewer than 21 credit hours." Article VII also accords other benefits to unit employees who have taught either a minimum of 51 credit hours (e.g., the opportunity to remedy deficiencies before being denied reemployment because of unsatisfactory teaching performance) or more than 51 credit hours (the possibility of an appointment for a full academic year).[6]

Article XIV, "Entire Agreement," states as follows:

> The parties acknowledge that during the negotiations which resulted in this Agreement, each had the right and opportunity to make demands and proposals on any subject or matter not removed by law from the area of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this, the sole Agreement between the parties regarding wages, hours, and other terms and conditions of employment. . . .

Article XV, "Review of Contract Provisions," lists several provisions of the CBA that "will be subject to review and, if required, revision of procedures necessary to implement them." The only CBA provisions discussed above listed in article XV are those in article VII according certain benefits to unit employees who have taught at least 51 credit hours (not including the provision dealing with bumping rights). However, those provisions were not subject to review and revision at the time relevant to this case. Article XV provides for potential review and revision "at 18 and 36 months following the beginning of this agreement," i.e., mid-2007 and early 2009. The credit-hour reductions at issue here were implemented in the fall semester of 2011.

[6] Language in the CBA suggesting a distinction between unit employees who have taught *at least* 51 credit hours and those who have taught *more than* 51 credit hours may have been unintended. Thus, art. VII(2) begins by referring to benefits for "unit members who have taught *51 or more* credit hours" but subsequently refers to those same benefits as afforded "to unit members with *over 51* credit hours of service to the College" (emphasis added).

The parties' relevant bargaining history: The record evidence shows that before the Union requested bargaining over the effects of the fall 2011 course credit-hour reductions, the College had repeatedly exercised its contractual right under Article II to make curricular changes, including changes to course credit hours, without bargaining with the Union over those decisions *or* their effects, and without the Union *requesting* either decision or effects bargaining. William Frederking, associate dean in charge of curriculum for the College's School of Fine & Performing Arts (SFPA) from 2008 to 2012, testified concerning such changes. According to Frederking, over 200 changes to existing courses offered in SFPA were approved for spring semester 2009, including several requests for credit-hour changes, and comparable numbers of changes were made in other semesters. Moreover, Frederking led a comprehensive review of SFPA's curriculum, which resulted in significant reductions in credit-hour requirements for degrees in a number of departments.[7] When that happened, some courses that had been required became electives and fewer sections of those courses were offered, resulting in fewer teaching opportunities. Separately, in the School of Media Arts, credit hours were changed for some courses offered in the Journalism Department. The Union never requested bargaining—including effects bargaining—over any of these changes. The Union did request bargaining regarding the effects of credit-hour reductions in Photography Department courses. The College refused to bargain but ultimately agreed to do so in settlement of an unfair labor practice charge. That settlement was reached on October 22, 2010. Five days later, on October 27, the College proposed modifying the management-rights clause to add an express effects-bargaining waiver.[8]

The precondition placed by the College on effects bargaining: On December 20, 2011, Union President Vallera asked the College for a list of all courses that had their credit hours reduced in the past 12 months and requested bargaining over the effects of those reductions. On February 21, 2012, the College furnished the list of courses. The same day, the College notified Vallera that it did not believe it had an obligation to bargain about course credit-hour reductions, but it was willing to meet

[7] The number of credit hours required for degrees in the following departments were reduced as follows: Art & Design, from 51 to 42; Arts, Entertainment & Media Management, from 58 to 42; Dance, from 57 to 42; Fashion Studies, from 58 to 48; Fiction Writing, from 54 to 36; Music, from 54–78 to 45; Photography, from 54 to 42; and Theatre, from 51–60 to 44–46.

[8] The proposed language read: "All the rights and responsibilities of [the College], *including the effects or impact of their decision to exercise such rights and responsibilities*, shall be retained and exercised in [its] sole discretion" (emphasis added).

and discuss the issue if the Union first gave the College a proposal regarding effects and a list of union members affected by the reductions. On March 23, Vallera repeated her bargaining request, and on April 16, the College reiterated its position that it had no duty to bargain and that it would not do so "unless and until the Union . . . specif[ies] what it wants to bargain and who it believes was affected."

ANALYSIS

A. The College Had No Duty to Engage in Effects Bargaining

1. The College had no duty to bargain over the effects of course credit-hour reductions because any effects were the inevitable consequences of a permissible managerial decision.

An employer has no duty to bargain regarding changes that are "the inevitable consequences of a permissible . . . managerial decision"—that is, where those changes "result directly" from a permissible managerial decision, and where "there [is] no possibility of an alternative change in terms of employment that would have warranted bargaining." *Fresno Bee*, 339 NLRB at 1214–1215. That was precisely the situation here. Reducing course credit hours was a permissible managerial decision. This is undisputed. The *effects* of the College's lawful decision to reduce course credit hours resulted *directly* from that decision, and there was no possibility of an alternative change because all such effects *were compelled by the CBA*.

As the foregoing review of the parties' CBA demonstrates, reducing the number of credit hours carried by a course had an effect on salary and benefits. Under article XI, unit employees were paid by the course, and how much they were paid was based on course credit hours, in two respects. First, article XI set forth salary levels for teaching a three-credit course and provided that "[c]ompensation for courses totaling other than three credits shall be prorated" accordingly. Thus, a credit-hour reduction necessarily reduced the salary a unit employee received for teaching the course. Second, the salary a unit employee received for teaching a course depended on the number of credit hours that employee had previously taught. The more credit hours taught, the higher the salary. Thus, when the College reduced the number of credit hours carried by a course, the unit employee assigned the course was paid less for the course itself, and the course added fewer credit hours to his or her cumulative total, affecting future compensation. In addition, under article VII, various benefits—e.g., bumping rights, the opportunity to remedy shortcomings before being denied reemployment based on unsatisfactory teaching performance, the possibility of receiving an appointment for a full academic year instead of a semester—were reserved for unit employees who had taught at least 51 credit hours. For unit employees who had taught fewer than 51 credit hours, the College's decision to reduce course credit hours may have delayed eligibility for these benefits. In addition, because bumping rights were exercised at the expense of unit employees with fewer than 21 credit hours, the course credit-hour reduction may have lengthened the time during which some unit employees were vulnerable to being bumped. However, all these effects on salary and benefits have one thing in common: they were all *compelled* by the terms of the parties' CBA, which the parties agreed to extend while they negotiated a successor agreement, and which remained in effect at all times relevant to this case. Moreover, neither the General Counsel nor the Union has identified a single effect of reducing course credit hours that was *not* compelled by the parties' CBA. All these effects were the contractually inevitable consequences of reducing course credit hours, a decision undisputedly within the College's sole discretion to make. And Board precedent is clear that there is no duty to bargain over "the inevitable consequences of a permissible . . . managerial decision." *Fresno Bee*, supra.

2. The parties' collective-bargaining agreement "covered" the matter in dispute and granted the College the unilateral right to decide to change course credit hours, and neither contract language nor bargaining history evidenced an intention to treat the effects of such a decision separately from the decision itself.

Under its "clear and unmistakable waiver" standard, the Board asks whether the "bargaining partners . . . [have] unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). However, some courts of appeals disagree with the Board's use of a waiver analysis when the collective-bargaining agreement contains language covering the matter in dispute that reveals the parties have *already* bargained over it. As the D.C. Circuit reasoned in *Department of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992), "[a] waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter; but *where the matter is covered by the collective bargaining agreement, the union has exercised its bargaining right* and the question of waiver is irrelevant" (emphasis in original). See also *NLRB v. United States Postal Service*, 8 F.3d 832 (D.C. Cir. 1993) (same); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933,

936–937 (7th Cir. 1992) ("[W]e wonder what the exact force of the 'clear and unmistakable' principle can be when the parties have an express written contract and the issue is what it means. . . ."). This approach is often referred to as a "contract coverage" analysis. In addition, and specifically regarding effects bargaining, the D.C. Circuit has held that when a collective-bargaining agreement "grant[s] an employer the unilateral right to make a particular decision," it would be "rather unusual" to find that the parties intended to reserve to the union the "right to bargain over the effects of that decision" unless "some language or bargaining history . . . support[s] the proposition that the parties intended to treat the issues separately." *Enloe Medical Center v. NLRB*, 433 F.3d 834, 839 (D.C. Cir. 2005).

As explained above, the College had no duty to bargain over the effects of its decision to reduce course credit hours because those effects were the inevitable consequences of a permissible management decision. But even assuming otherwise, I would still conclude that the College had no duty to bargain over its decision to reduce course credit hours or the effects of that decision under a "contract coverage" analysis.

Regarding the decision itself, under Article II of the CBA the College retained "sole discretion," among other things, to "modify . . . all aspects of educational policies and practices," including the "modification" or "alteration" of "any . . . course." Reducing the number of credit hours a course is worth constitutes a "modification" or "alteration" of that "course," and no party disputes that the CBA gave the College the right to make this decision unilaterally.

Regarding the effects of the decision, the CBA contains no language, and the record evidence discloses no bargaining history, supporting the proposition that the College and the Union intended to treat the effects of a decision to reduce course credit hours separately from the decision itself. See *Enloe Medical Center*, supra. Indeed, far from reserving to the Union a right to bargain over the effects of a decision to change course credit hours, the language of the CBA demonstrates that the Union had already "*exercised its bargaining right*" concerning those very effects. *Department of Navy v. FLRA*, 962 F.2d at 57. As explained above, Article II of the CBA based the salary for teaching a course on (i) the number of credit hours the course carries, and (ii) the total number of credit hours taught by the unit employee teaching the course. The CBA also linked various benefits—e.g., bumping rights, the opportunity to remedy teaching deficiencies before being denied reemployment, the possibility of an academic-year appointment—to the total number of credit hours a unit employee had taught. Thus, when the College exercised its right to increase or decrease the number of credit hours a course carries, the effects were felt in unit employees' salary and benefits *as the Union bargained and agreed they would be*.

As to bargaining history, again, the record discloses no intention on the part of the Union and the College to treat effects bargaining separately from decision bargaining. Indeed, it discloses a contrary intention. Prior to the bargaining demand at issue here, the College refused the Union's one request to engage in effects bargaining (regarding course credit-hour reductions in the Photography Department). In settlement of a Board charge, the College agreed to bargain—but just five days later, in negotiations for a successor to the 2006–2010 CBA, it proposed adding an express waiver of effects bargaining to the management-rights clause. The judge deemed this proposal evidence that the parties *previously* regarded effects as separately bargainable. I disagree. The College had *refused* the Union's one and only effects-bargaining request. I believe its waiver proposal was an attempt to formalize what had been the College's understanding all along. Moreover, the College had made hundreds of changes to the curriculum, including changing the number of credit hours carried by certain courses or required for certain majors, without bargaining over the effects of these changes, and without the Union requesting bargaining. In sum, there is *no* evidence in the parties' bargaining history of a shared intent to treat decision and effects bargaining separately.

3. The Union clearly and unmistakably waived any right to engage in effects bargaining regarding the course credit-hour reductions.

I would reach the same conclusion—that the College had no obligation to bargain concerning the effects of its decision to reduce course credit hours—under the Board's "clear and unmistakable waiver" standard. Again, under this standard, the Board asks whether the "bargaining partners . . . [have] unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena St. Joseph Medical Center*, 350 NLRB at 811.[9] Here, the Union

[9] A waiver of bargaining rights may also be inferred from the parties' past practice or from a combination of the express provisions of the collective-bargaining agreement and the parties' past practice. *American Diamond Tool, Inc*., 306 NLRB 570, 570 (1992). Additionally, a bargaining waiver may result from a union's failure to request bargaining after receiving notice or learning of a particular change or proposal. See, e.g., *Finch, Pruyn & Co*., 349 NLRB 270 (2007) (finding that union waived its right to bargain by failing to request bargaining over post-strike continuation of subcontracting), enfd. mem. 296

entered into a CBA that undisputedly granted the College the right to "alter[] . . . any . . . course," including by altering the number of credit hours a course carries, and it further agreed, in the same CBA, to multiple provisions linking salary and benefits to course credit hours. In other words, the Union contractually agreed to the very effects about which it subsequently demanded bargaining during the term of that agreement. To change those effects would have required modifying the CBA—a request the College was entitled to reject out of hand. See, e.g., *Kellogg Co.*, 362 NLRB No. 86, slip op. at 5 (2015) ("[W]hen a collective-bargaining agreement is in effect, a party is under no obligation to consent to, or even discuss, proposed midterm modifications of a contractual term, unless the agreement contains a reopener provision.").[10]

For proof that the Union sought to modify the CBA rather than to bargain over effects, consider the Union's own brief to the Board in this case. In its "Brief in Opposition to Exceptions filed by Respondent" (Union's answering brief), the Union repeatedly points to the following effects, and *only* the following effects, of a course credit-hour reduction: (i) an immediate decrease in salary, since "adjunct faculty are paid by the credit hour" (Union's answering brief at 3); (ii) an impact on future salary "because compensation depends in part on how many credit hours they have previously taught" (id. at 12); and (iii) an impact on work assignments, i.e., bumping rights ("Pursuant to Article VII of the parties' CBA, the College will assign a [unit employee] who loses a course to teach a course previously taught by a different faculty member, but only if the unit member has taught more than 51 credit hours. This change in assignment can only occur when the faculty member to be removed from the teaching assignment has taught less than 21 credit hours" (id. at 10–11).). The Union might have added that course credit-hour reductions also affected if and when a unit employee became entitled to an opportunity to remedy subpar performance and to eligibility for an academic-year appointment. All these effects have one thing in common: they were *compelled* by the terms of the parties' CBA. They could not be altered during the term of the CBA without modifying the CBA itself, which is not bargainable but requires the parties' consent. Under these circumstances, I believe the only reasonable conclusion is that the Union clearly and unmistakably waived its right to bargain concerning every single effect the Union itself has identified as an issue about which it sought bargaining.[11]

B. The College Did Not Violate the Act by Setting a Precondition on Effects Bargaining Because It Had No Duty to Engage in Such Bargaining to Begin With

The judge found, and my colleagues agree, that the College violated Section 8(a)(5) by setting a precondition on bargaining. I agree that, generally speaking, setting a precondition on bargaining violates the Act. Under Section 8(d), employers and unions under a duty to bargain collectively must fulfill their "mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment," and neither party may impose a precondition on its fulfillment of that obligation. See, e.g., *Riverside Cement Co.*, 305 NLRB 815, 818–819 (1991) (employer violated Section 8(a)(5) by conditioning its willingness to meet and bargain with union on the presence of a federal mediator), enfd. mem. 976 F.2d 731 (5th Cir. 1992). However, Section 8(d)'s definition of the duty to bargain collectively does not apply to parties that are not under that duty, and for the reasons explained above, the College had no duty to bargain collectively

Fed. Appx. 83 (D.C. Cir. 2008) (per curiam); *AT&T Corp.*, 337 NLRB 689, 692–693 (2002) (finding that union waived bargaining over closure of employer's Tucson facility, despite initially discussing closure with employer, when it "'dropped the ball' by failing to pursue the matter"). A bargaining waiver may also result, in some cases, from bargaining conduct itself. See *U.S. Lingerie Corp.*, 170 NLRB 750, 751–752 (1968) (finding that union waived bargaining over shutdown of New York plant when it insisted on holding employer to results of multiemployer bargaining then underway, where employer had lawfully withdrawn from multiemployer association).

[10] As stated above, the CBA did contain a reopener provision (art. XV), which applied to some of the benefits provided under article VII. But the CBA could only be reopened "at 18 and 36 months following the beginning of this agreement," i.e., mid-2007 and early 2009. The credit-hour reductions at issue here were implemented fall semester 2011.

[11] Because I would reach the same result under either the Board's "clear and unmistakable waiver" standard or the "contract coverage" standard embraced by the D.C. and Seventh Circuits, I find it unnecessary in this case to pass on whether the Board should adopt the "contract coverage" standard.

My colleagues disagree that the effects of the course credit hour changes were the inevitable consequences of a permissible managerial decision, or alternatively that the Union waived bargaining over the effects of the course credit hour changes. They point to the fact that article XI of the CBA states that the salary schedule set forth therein represents "minimum compensation" for a three credit hour course. Based on those words, they say that the CBA did not dictate the effects of the changes in course credit hours. The General Counsel and the Union view the matter differently. According to the General Counsel, "the parties at Columbia College negotiated a definition of course credit hours and then used it to *define* experience, workload and salary structure" (GC's answering brief at 6) (emphasis added). According to the Union, "a decrease in the number of credit hours assigned a course *necessarily* decreases the pay received" (Union's answering brief at 3), and "the number of credit hours *determines* compensation to part time adjunct faculty" (id. at 6). In finding that the College had no duty to engage in effects bargaining, I have adopted the General Counsel's and the Union's own view of the effects necessarily entailed by the CBA.

regarding the effects of its decision to reduce course credit hours. On this basis, I would find the College did not violate the Act by conditioning its willingness to meet on the Union first specifying "what it wants to bargain [about] and who it believes was affected" by the course credit-hour reductions.

C. The Majority's Bargaining-Costs Remedy Is Unwarranted

The Board's standard remedies for an unlawful failure to bargain are an order to cease and desist, to bargain, and to post an appropriate notice. These are the remedies the Board applies "[i]n most circumstances." *Frontier Hotel & Casino*, supra, 318 NLRB at 859. In rare cases, the Board may impose the extraordinary remedy of requiring the respondent to reimburse the charging party for its negotiation expenses. However, this remedy is warranted only "[i]n cases of unusually aggravated misconduct, . . . where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies." Id. (internal quotations omitted).

Near the end of his exceedingly detailed, thorough decision, the judge considered the Union's request for a bargaining-expenses remedy and concluded that "Respondent's misconduct, while serious, falls short of the aggravated level required to justify an award of bargaining expenses." "I *cannot* find," the judge wrote, "that Respondent's misconduct was so aggravated as to infect the bargaining process to the point where traditional remedies would not be effective" (emphasis added). The judge went on to say that cases in which the Board has awarded bargaining costs involved "misconduct *well beyond* that which the Respondent engaged in here" (emphasis added). My colleagues reverse the judge's decision and impose a bargaining-costs remedy on the College. I am not persuaded by their reasons for doing so, contrary to the judge's well-supported decision.

First, my colleagues rely on the fact that the College proposed changes in items that had been designated "NID," or "not in dispute." My colleagues say that by doing so, the College "forced the Union to expend resources bargaining anew on those items—resources that could have been devoted to addressing open items." But items designated "NID" *were* open items. As the judge found, "the parties and the Federal mediator came up with the term NID precisely because NIDs were not meant to rise to the level of tentative agreements," and the College "consistently maintained that all NIDs remain open for further negotiation." There are no exceptions to these findings.

Second, my colleagues rely on two instances in which the College imposed a precondition on meeting with the Union for collective bargaining. I have found one of these two instances lawful on the basis that the College had no duty to bargain in the first place. But even assuming the College violated the Act both times, this does not rise to the level of "unusually aggravated misconduct" warranting the extraordinary remedy of reimbursing the Union for its bargaining expenses.

Third, my colleagues impose a bargaining-costs remedy because the College proposed that the Union waive its effects-bargaining rights. There is nothing unlawful in such a proposal. The complaint did not allege, and the judge did not find, that the College violated the Act by making this proposal. My colleagues object to it because, if accepted, it "would have left bargaining-unit employees with fewer rights and less protection than they would have under the Act without a contract." But employers are not prohibited from proposing a contract term that would have such an effect. Indeed, precedent demonstrates to the contrary. A Board majority believes that unrepresented employees have a right under the Act never to accept employment under the condition that they agree to arbitrate employment-related disputes individually—even if they have the right to opt out of the agreement, *On Assignment Staffing Services*, 362 NLRB No. 189 (2015), and even if no such condition is imposed at all and employees are merely invited to opt *in* to an arbitration agreement, *Bristol Farms*, 363 NLRB No. 45 (2015). But the Supreme Court has expressly upheld language in a collective-bargaining agreement requiring the bargaining-unit employees to submit claims of employment discrimination to binding arbitration. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). If a collective-bargaining agreement may lawfully contain such language, it cannot be unlawful to propose it, even though such a proposal, in my colleagues' view, would leave employees with fewer rights than unrepresented employees have. The College has not crossed any impermissible line by proposing a waiver of effects-bargaining rights. Rather, the Board majority in this case has crossed such a line by passing on the merits of the College's lawful bargaining proposals. It is well established that the Board lacks authority to dictate the substance of collective bargaining negotiations in this fashion. See *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952) ("[T]he Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."); *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 107–108 (1970) ("It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process

of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties.").

CONCLUSION

For the reasons set forth above, I respectfully dissent.

Dated, Washington, D.C. March 24, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain with the Part-Time Faculty Association at Columbia (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT set unlawful preconditions that the Union must satisfy before we will engage in face-to-face bargaining or effects bargaining.

WE WILL NOT fail and refuse to bargain with the Union about the effects of our decision to reduce the number of credit hours awarded for the following 10 courses: Accounting; Screenwriting Workshop; Adaptation in LA; Acquiring Intellectual Property/LA; Theory, Harmony & Analysis I; Theory, Harmony & Analysis II; Directing I; Pro Survival & How to Audition; Local Government Politics Seminar; and State and National Government Politics Seminar.

WE WILL NOT refuse to bargain collectively with the Union by refusing to furnish it, or unreasonably delaying in furnishing it, with requested information that is relevant and necessary to the Union's performance of its function as the collective-bargaining representative of our unit employees.

WE WILL NOT maintain Rule 5.1 in our Network and Computer Use Policy.

WE WILL NOT notify you that you face forthcoming disciplinary action because you engaged in protected activity.

WE WILL NOT discriminate against you in teaching assignments because you engaged in protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment; and if an understanding is reached, embody the understanding in a signed agreement:

> [A]ll part-time faculty members who have completed teaching at least one semester at Columbia College Chicago, excluding all other employees, full-time faculty, artists-in-residence, and Columbia College Chicago graduate students, part-time faculty members teaching only continuing education, music lessons to individual students or book and paper making classes, Columbia College Chicago full-time staff members, teachers employed by Erickson Institute, the YMCA or Adler Planetarium, and other individuals not appearing on the Columbia College Chicago payroll, managers and confidential employees, guards, and supervisors as defined in the Act.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit concerning the effects of our decision to reduce the number of credit hours awarded for the following 10 courses: Accounting; Screenwriting Workshop; Adaptation in LA; Acquiring Intellectual Property/LA; Theory, Harmony & Analysis I; Theory, Harmony & Analysis II; Directing I; Pro Survival & How to Audition; Local Government Politics Seminar; and State and National Government Politics Seminar.

WE WILL make any unit members who taught the 10 courses listed above whole for any loss of earnings and other benefits suffered as a result of our failure to engage in effects bargaining.

WE WILL make Diana Vallera whole for any loss of earnings or other benefits suffered as a result of the discrimination against her.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our notifi-

cation to Diana Vallera that we were contemplating disciplining her for engaging in protected activity and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the notification will not be used against her in any way.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, to the extent that we have not yet done so, furnish to the Union in a timely manner the information requested in the following information requests: December 20, 2011 (Early Feedback System); May 13, 2012 (Fall 2012 faculty class assignments); and May 17, 2012 (investigation of Diana Vallera for misconduct).

WE WILL rescind Rule 5.1 in our Network and Computer Use Policy.

WE WILL furnish all current employees with written notice that Rule 5.1 in the Network and Computer Use Policy has been rescinded or with a revised policy that does not contain the unlawful rule or that provides a lawfully worded rule.

WE WILL reimburse the Union for all costs and expenses, including salaries, incurred in collective-bargaining negotiations from March 31, 2011, to June 13, 2012, in connection with case 13–CA–078080 and from February 21, 2012, to May 4, 2012, in connection with Case 13–CA–073487.

COLUMBIA COLLEGE CHICAGO

The Board's decision can be found at www.nlrb.gov/case/13-CA-073486 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Daniel Murphy, Esq., for the Acting General Counsel.
Lisa McGarrity and *Abizer Zanzi, Esqs.,* for the Respondent.
Laurie Burgess, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEOFFREY CARTER, Administrative Law Judge. This case was tried in Chicago, Illinois, on October 22–26 and November 27–28, 2012. The Part-Time Faculty Association at Columbia College Chicago (PFAC) filed the charges in this matter on the following dates:

Case 13–CA–073486:	Charge filed on January 30, 2012, and amended on February 10, 2012;
Case 13–CA–073487:	Charge filed on January 30, 2012;
Case 13–CA–076794:	Charge filed on March 16, 2012, and amended on April 26, 2012;
Case 13–CA–078080:	Charge filed on April 4, 2012;
Case 13–CA–081162:	Charge filed on May 16, 2012; and
Case 13–CA–084369:	Charge filed on July 3, 2012, and amended on August 6, 2012.

The Acting General Counsel issued a complaint covering Case 13–CA–073486 on April 17, 2012, and subsequently issued consolidated complaints on April 17 (adding Case 13–CA–073487), June 29 (adding Case 13–CA–076794),[1] July 31 (adding Cases 13–CA–078080 and 13–CA–081162), and August 28, 2012 (adding Case 13–CA–084369).[2]

The consolidated complaint alleges that Respondent Columbia College Chicago (Respondent or the College) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining an unlawful Network and Computer Use Policy, and by selectively and disparately applying that policy only against employees who voice their support for unions.

The consolidated complaint also alleges that Respondent violated Section 8(a)(3), (4), and (1) of the Act by: failing and refusing to assign classes to PFAC President and Part-Time Faculty Member Diana Vallera for the summer 2012 semester; failing and refusing to assign more than one class section to Vallera for the fall 2012 semester; beginning an investigation of Vallera in April or May 2012 for alleged misconduct in April or May 2012; and issuing a notice of "Complaint of Misconduct" to Vallera on or about May 14, 2012.

[1] The June 29 consolidated complaint was amended on July 10, 2012.

[2] On September 7, 2012, the Respondent filed a motion for a bill of particulars. In an order dated September 14, 2012, Deputy Chief Administrative Law Judge Arthur Amchan granted the motion in part, and directed the Acting General Counsel to identify the agents of Respondent to whom PFAC requested bargaining about the impact and effects of Respondent's implementation of its decision to reduce course credit hours in several departments. The allegation that Judge Amchan addressed in his order first appeared in the consolidated complaint that the Acting General Counsel filed on April 27, 2012. (See GC Exh. 1(o), par.VI,(a).)

On September 21, 2012, the Acting General Counsel complied with Judge Amchan's order and filed an amendment to par. IX,(a) of the August 28, 2012 consolidated complaint. The amendment specified that Dr. Louise Love was the agent who received the requests to bargain about course credit hours. No new complaint allegations were added.

Further, the consolidated complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by: failing and refusing to provide PFAC with information that PFAC requested in separate requests dated December 20, 2011, and May 13 and 17, 2012; failing and refusing, since February 21, 2012, to bargain collectively about the impact and effects of Respondent's decision to reduce the number of credit hours awarded for certain courses; failing and refusing, since May 8, 2012, to bargain collectively about the impact and effects of Respondent's implementation of its prioritization plan to restructure operations; failing and refusing, since February 16, 2012, to meet and bargain with PFAC to negotiate a successor collective-bargaining agreement; and failing and refusing, by its overall conduct, to bargain in good faith with PFAC as the exclusive collective-bargaining representative of the bargaining unit.

And, the consolidated complaint alleges that Respondent violated Section 8(a)(5) and (1) and failed to bargain collectively and in good faith with PFAC within the meaning of Section 8(d) of the Act by, on or about March 23, 2012: unilaterally changing the scope of the bargaining unit by only applying the terms of the collective-bargaining agreement to individuals currently teaching a course; and repudiating the grievance procedure contained in the parties' collective-bargaining agreement.

Respondent filed a timely answer denying each allegation in the consolidated complaint. On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a not-for-profit corporation, operates a private college at its facility in Chicago, Illinois, where it annually derives gross revenues available for operating expenses in excess of $1 million, and purchases and receives goods and materials valued in excess of $5000 directly from points outside of the State of Illinois. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that PFAC is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES—BACKGROUND FACTS

This case combines a mixture of distinct, but related allegations that arose from the somewhat contentious relationship between Columbia College Chicago and PFAC (and PFAC President Diana Vallera). Broadly speaking, the Acting General Counsel and PFAC allege that Columbia College unlawfully:

(a) maintained an overbroad Network and Computer use policy, and disparately applied that policy against employees who expressed support for unions;

(b) failed to bargain in good faith with PFAC as demonstrated by its overall conduct, and specifically about a successor collective-bargaining agreement, and the effects of changes that the College planned to make (or did, in fact, make) to the number of credits awarded for certain courses and the overall organization of the College (under the College's prioritization plan);

(c) made unilateral changes to the scope of the bargaining unit and unilaterally repudiated the grievance procedure set forth in the collective-bargaining agreement;

(d) discriminated against Vallera when it made class assignments for summer and fall 2012, and when it decided to investigate Vallera in May 2012 for alleged misconduct; and

(e) failed and refused to respond to three information requests that PFAC submitted.

Since the allegations in the case are distinct, I only provide my background findings of fact in this section. My specific findings of fact for each complaint allegation are set forth in section IV of this decision.

A. Columbia College Chicago—Overview

Columbia College Chicago is a private, independent college that specializes in arts, communication, and media. The College serves a total of 10,000–12,000 students in its undergraduate and graduate programs, and offers courses during fall, spring, and summer semesters.[4] (Tr. 452–453, 457.)

In terms of its organizational structure, Columbia College is divided up into the following schools, each of which is headed by a dean: Fine and Performing Arts; Liberal Arts and Sciences, and Media Arts. Each school is composed of departments that are headed by department chairs, who in turn manage coordinators that lead various areas of concentration within the department. The College has 23 departments overall, and employs approximately 360 full-time faculty members and 1250 part-time faculty members. Part-time faculty members teach approximately 75 percent of the courses offered at Columbia College. (Tr. 25–26, 453–455, 645–646.)

B. PFAC—Overview

1. PFAC and the bargaining unit

Since 1998, PFAC has served as the exclusive collective-bargaining representative of the following bargaining unit at the College:

> [A]ll part-time faculty members who have completed teaching at least one semester at Columbia College Chicago, ex-

[3] I note that although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those specific record citations, but rather are based on my review and consideration of the entire record for this case.

I also make the following corrections to the record: (a) R. Exh. 83 was included in the exhibit files in error, and erroneously indicates that the exhibit was identified and received into evidence, but later withdrawn. The record shall reflect that R. Exh. 83 was identified, but was not received, and subsequently was withdrawn (see Tr. 859–862, 871); and (b) CP Exh. 5 was rejected during trial (see Tr. 998–999), and thus should not have been included in the exhibit file.

[4] The college also offers classes during its winter break in January (the J term). (Tr. 453.)

> cluding all other employees, full-time faculty, artists-in-residence, and Columbia College Chicago graduate students, part-time faculty members teaching only continuing education, music lessons to individual students or book and paper making classes, Columbia College Chicago full-time staff members, teachers employed by Erickson Institute, the YMCA or Adler Planetarium, and other individuals not appearing on the Columbia College Chicago payroll, managers and confidential employees, guards, and supervisors as defined in the Act.

(Respondent (R.) Exh. 1, p. 1.; see also GC Exh. 2(a) (Certification of Representative, dated February 26, 1998).) The parties agree that the PFAC bargaining unit is an appropriate unit for collective-bargaining within the meaning of Section 9(b) of the Act. (GC Exh. 1,(ll), par. 7(a).) During the relevant time period, the bargaining unit included approximately 1200 part-time faculty members. (Tr. 29–30, 770, 1179.)

PFAC and the College are parties to a collective-bargaining agreement that was intended to be in effect from 2006 to 2010. (R. Exh. 1.) By the parties' mutual agreement, the terms of the 2006–2010 agreement have remained in effect while the parties have attempted to negotiate a successor collective-bargaining agreement. (Tr. 33–34, 455, 1004.)

2. PFAC President Diana Vallera

In fall 2005, Diana Vallera began working for the College as a part-time faculty member in the photography department. (Tr. 24–25.) At the time of her hire, Bob Thall was the photography department chair, and Elizabeth Ernst was one of the coordinators in the photography department. (Tr. 26.) Consistent with the College's preference for hiring working professionals, Vallera had a background in fine arts that included painting and mixed media work, and also had commercial experience by virtue of her studies with Hedrich-Blessing, an architectural and photography firm. (Tr. 243–244; GC Exh. 96.)

In 2008, Vallera became a steward for PFAC in the photography department. Vallera later joined PFAC's executive committee, and in 2010 became PFAC's president. (Tr. 29.)

III. CREDIBILITY FINDINGS

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622.

My credibility findings are stated in the findings of fact that are set forth in section IV of this decision. I note, however, that the witnesses that both the Acting General Counsel and the Respondent presented were generally credible, save for some specific instances that I describe more fully in the findings of fact below. Many of the probative facts were established by email communications and other documentation that, for the most part, were not disputed by any of the parties.

IV. FINDINGS OF FACT, DISCUSSION, AND ANALYSIS

A. Bargaining for a Successor Collective-Bargaining Agreement

1. Complaint allegations

The complaint alleges that since on or about February 16, 2012, Respondent has failed and refused to meet and bargain with PFAC (the exclusive collective-bargaining representative of the bargaining unit) regarding a successor collective-bargaining agreement. (GC Exh. 1(ff), par. XI(c) (alleging violation of Sec. 8(a)(5) and (1)).)

2. Findings of fact

a. The College and PFAC begin negotiations for a successor collective-bargaining agreement

As previously noted, PFAC and the College are parties to a collective-bargaining agreement that was intended to be in effect from 2006 to August 31, 2010. (R. Exh. 1.) In January 2010, PFAC and the College began negotiations for a successor collective-bargaining agreement, with PFAC President Diana Vallera leading PFAC's bargaining team, and Louise Love leading the College's bargaining team. (Tr. 36–37, 457–458.) By the parties' mutual consent, the terms of the 2006–2010 collective-bargaining agreement have remained in effect while the parties have attempted to negotiate a successor contract. (Tr. 33–34, 455, 1004.)

Initially, the parties met every Friday for negotiations, unless a scheduling conflict precluded their weekly meeting. Javier Ramirez from the Federal Mediation and Conciliation Service served as the facilitator/mediator for negotiations. (Tr. 52, 458.) The parties were able to reach a tentative agreement about contract language for academic freedom.[5] (Tr. 460–461; see also R. Exh. 1, art. V.) The College, however, was not willing to make tentative agreements on any other parts of the contract, because it wished to retain the option to negotiate about the contract as a whole once a working draft was established. (Tr. 461–462; R. Exh. 86, p. 4; R. Exh. 87, p. 4.) Accordingly, to keep track of contract language or clauses where the parties were at or near agreement (but where further negotiation might still occur), the parties kept a list of contract items that were not in dispute (NIDs). (Tr. 59–61, 461–462; see also GC Exh. 9 (PFAC changed from using tentative agreement on

[5] The academic freedom clause states as follows: "The College hereby reaffirms that all members of the College faculty, regardless of their employment status, are entitled to academic freedom, as currently defined in the Faculty Handbook or as may be revised from time to time in consultation with [PFAC]." (R. Exh. 1, art. V.)

April 20, 2011, to using the term NID on April 22, 2011, on its list of contract clauses where the parties had found common ground).)[6]

b. The College proposes that PFAC waive its right to effects bargaining

On October 27, 2010, the College sent PFAC a contract proposal that included a modified management-rights clause. (GC Exh. 5, art. II.) The 2006–2010 contract included a management-rights clause that, generally speaking, allowed the College to retain its right to make decisions about its educational, fiscal and employment policies. Specifically, the existing management-rights clause states as follows:

> Columbia College Chicago and its Board of Trustees retain all their rights . . . inherent in the management of the College . . . except as specifically modified by this Agreement during its term. All the rights and responsibilities of [the College] shall be retained and exercised in their sole discretion including by way of example and not in any way limited to:
>
> A. The right to plan, establish, terminate, modify and implement all aspects of educational policies and practices, including curricula; admission and graduation requirements and standards; . . . and the establishment, expansion, subcontracting, reduction, modification . . . or transfer of any job, department, program, course, institute or other academic or non-academic activity and the staffing of the activity, except as may be modified by this Agreement.
>
> B. The right to manage the College and direct the College's property, including fiscal and budgetary policy . . . except as may be modified by this Agreement.
>
> C. The right to hire, direct, transfer, assign, terminate, lay off, discipline, appoint, reappoint, and evaluate its employees and to establish, modify, and discontinue rules and regulations of procedure, conduct, policies, standards, and practices relating to the performance of work, including workload, scheduling of work and its location and criteria and qualifications for appointment, retention, and promotion of employees, except as may be modified by this Agreement.

(R. Exh. 1, art. II (noting that the enumeration of management's rights was not all-inclusive, and did not exclude management rights not specifically listed).) The October 27 proposal included a similar management-rights clause, but added language indicating that the management-rights clause extended to the effects or impact of any management decisions that the College might make in the designated areas.[7] (Tr. 43–44, 148; GC Exh. 5, art. II.)

On October 29, 2010, the bargaining teams met for one of their regularly scheduled sessions. At that session, Vallera expressed concern about the new management-rights clause that the College proposed. Vallera explained that PFAC objected to the proposal because it seemed regressive and sought a waiver of effects bargaining, and because the parties had just settled (on October 22, 2010) a case in which PFAC alleged that the College failed and refused to bargain with PFAC about the effects of changes that the College made to course credit hours in the photography department. (Tr. 49; GC Exh. 4.) When Vallera asked why the College was making such a proposal, general counsel Annice Kelly cited the parties' dispute about course credit hours that led to the settlement, and asserted that the College did not want to have a dispute with effects bargaining arise in the future. PFAC did not agree to the College's proposal; the College, however, retained its management-rights clause proposal as negotiations proceeded. (Tr. 49–50, 148–149; GC Exhs. 6(a), p. 1, 6(b), pp. 1-3; see also GC Exh. 8, art. II (March 30, 2011 proposal that included the same version of the management-rights clause that the College proposed in October 2010).)

c. Initial progress towards an agreement

Notwithstanding their disagreements on certain issues, from April to mid-September 2011, the parties were able to identify and set aside NIDs for several aspects of the contract. (Tr. 64; GC Exh. 9.) For example, as of June 9, 2011, the parties had identified NIDs for the following areas: college/[PFAC] relationship (art. IV of the contract); governance (art. VI); and grievance procedures (art. XII). Similarly, as of September 23, 2011, the parties determined that the policy statement regarding performance evaluations for PFAC members was a NID.[8] (GC Exh. 9.) At the September 23, 2011 bargaining session, however, Love reiterated the College's position that all NIDs would still be open for negotiation when the College reviewed the proposed new collective-bargaining agreement as a whole. (R. Exh. 85.)

d. Summer 2011—changes to the bargaining process and the College's bargaining team

With the arrival of late summer/early fall 2011 came certain changes to the bargaining process. First, the parties switched from a traditional to a "small group" bargaining format. (Tr. 52–53, 364, 458–459.) With small group bargaining (a/k/a "sidebar" negotiations), the parties sent only one or two repre-

[6] I do not credit Vallera's testimony that the parties agreed that tentative agreements were the same thing as NIDs. (See Tr. 1270.) The evidentiary record, including portions of PFAC's bargaining notes, establishes that the College repeatedly maintained that NIDs were different from tentative agreements in that NIDs were more subject to future negotiation (particularly once the parties developed a working draft of an entire contract).

[7] The new language appeared in the first paragraph of the management-rights clause, and stated: "All the rights and responsibilities of [the College], *including the effects or impact of their decision to exercise such rights and responsibilities*, shall be retained and exercised in their sole discretion . . ." (GC Exh. 5, art. II (emphasis added).)

[8] Although it did not reach the status of being a NID, on July 22, 2011, the College presented a draft proposal for contract language about instructional continuity. In general, the draft instructional continuity language outlined special procedures that the College would follow to assist with ensuring that part-time faculty members who have taught 51 or more credit hours at the College are assigned classes to teach in the fall and spring semesters. (Tr. 112–113; GC Exh. 34.)

sentatives to bargaining sessions, instead of the entire bargaining team. To facilitate open discussion and exchange of information, small group bargaining sessions did not include attorneys or human resources office representatives. Discussions in the small group sessions were viewed as off the record, and thus were not meant to be memorialized by any bargaining notes. (Tr. 459–460, 1011–1012, 1181.)

Second, Love began phasing out her role as a member of the College's bargaining team, and Leonard Strazewski joined the College's bargaining team in late summer 2011 to take Love's place. (Tr. 458, 479, 481, 1003–1004.) Since Strazewski was not familiar with status of bargaining (or the term NID) when he joined the process, both he and Love served together on the bargaining team for a while, and the College's bargaining team jointly helped Strazewski get up to speed. (Tr. 479, 1006, 1011, 1115–1116.) Strazewski was not briefed, however, on what specific NIDs the parties identified before he joined the College's bargaining team. (Tr. 1120.)

e. The College resubmits its March 30, 2011 contract proposal, and disputes arise about the status and progress of negotiations

On September 30, the General Counsel issued the complaint in Case 30–CA–018888. (GC Exh. 10(a).) Respondent received a copy of the complaint on October 6. (GC Exh. 10(b).) The next day, on October 7, the College and PFAC met for a small group collective-bargaining session. At that meeting, PFAC made a proposal regarding instructional continuity. In response, Strazewski rejected the instructional continuity proposal in its entirety, and advised PFAC that the College was resubmitting its March 30 contract proposal. When the mediator and Vallera asked Strazewski whether he was aware of the various proposals (including NIDs) that the parties had exchanged since March 30, Strazewski replied that he was not aware of that history, and was simply following the instructions of the College's office of general counsel to submit the March 30 proposal. The meeting then ended, but not before Vallera questioned whether Strazewski had sufficient authority to bargain on behalf of the College. (Tr. 66–69, 1016–1017.)

On October 21,[9] Vallera sent an email to Love to express PFAC's concern that the College was engaging in regressive bargaining.[10] First, Vallera expressed concern about the College's decision to return to its March 30 contract proposal, noting that in doing so, the College would eliminate a number of proposals that the parties discussed and/or agreed were not in dispute. Second, Vallera questioned the timing of the College's decision, which in her view came "on the heels of the decision by the National Labor Relations Board to issue a complaint against the College" in Case 30–CA–018888. In light of those concerns, Vallera asked Love to clarify the College's position as to the status of contract negotiations. (Tr. 75, 1016; GC Exh. 13.)

Love replied to Vallera's email on October 25. Instead of addressing Vallera's concerns directly, Love asserted that through her email, Vallera broke the ground rules that the parties set for small group (sidebar) negotiations. Specifically, Love stated:

> It is unfortunate that once again you have decided to breach the guidelines that both sides agreed upon when we entered into the "side bar" form of negotiations. You will recall that both sides agreed that everything would be "off the record" and there would not be any actual or threatened grievances or [unfair labor practices (ULPs)] filed as a result of what was stated in the side bar. Your e-mail of October 21, 2011 violates both the spirit of the side bar negotiations and the letter of it.
>
> As a result, Columbia requires that P-Fac reaffirm its position that conversations that take place in the side bar are off the record and will not be used as grounds for a ULP or grievance. Without this confirmation from P-Fac, which Columbia views as necessary to have any sort of trust that P-Fac can be taken at its word, Columbia will have to rethink whether the side bar is the best format for it to negotiate.

(GC Exh. 14.)

The College and PFAC convened for bargaining on October 28, but sat in different rooms so the mediator could speak with each party separately about whether they would continue with small group bargaining (PFAC's preference), or proceed using a different format (the College's preference). (Tr. 80, 1021; see also R. Exh. 51.) Once it became clear that the parties could not agree on a process to use for negotiations, the mediator notified the parties that he was withdrawing because he was not adding anything to the process. (Tr. 80; R. Exh. 51.)

f. November 2011—the College decides to suspend negotiations until it prepares and submits a new contract proposal for PFAC to review

Because of some miscommunication and confusion between the parties about when they would next meet for bargaining, the parties did not meet on November 4 (the customary Friday morning meeting). (Tr. 81; GC Exhs. 16–17; R. Exh. 51.) However, the point became moot on November 10, when the College decided that it wanted to prepare and submit a new contract proposal for PFAC to review before the parties resumed face to face negotiations.[11] As Love explained to Vallera via email:

> Diana: Based on our small group discussions and as a way to move forward, the College is preparing another comprehensive contract proposal. Until this proposal is ready and you have reviewed it, we do not see the need to meet. We hope to

[9] The parties did not meet for bargaining on October 14 because Vallera had a scheduling conflict and canceled the meeting. (GC Exh. 11.) The parties did meet for a small group bargaining session on October 21, but Vallera was not present in the bargaining room when she sent her email. (Tr. 1015–1016.)

[10] Vallera emailed Love because she still questioned Strazewski's authority to bargain for the College, and Love was Strazewski's predecessor as the leader of the College's bargaining team. (Tr. 75.)

[11] Strazewski explained that he recommended that the College do a new contract proposal because the March 30 proposal contained some ambiguous language that he believed was creating some problems in understanding what was being negotiated. Strazewski also maintained that in the College's view, it would be beneficial for the parties to return to discussing specific, concrete proposals. (Tr. 1024–1025, 1060.)

> have this proposal completed by the middle of December and will forward to you and the P-Fac team. We propose that your team then take time to review the proposal and get back to us sometime in January.

(GC Exh. 18.) Vallera opposed the College's plan to prepare a new contract proposal and expressed PFAC's preference to resume small group bargaining sessions, but Love responded that the College would send PFAC a new contract proposal in December as planned. (GC Exhs. 19–20.)

g. December 2011—the Colleges sends PFAC a new contract proposal

On December 19, the College sent PFAC its new contract proposal for review.[12] In its December contract proposal, the College deleted the "instructional continuity" language from the contract, such that it would no longer be obligated to make an effort to find replacement class assignments for certain experienced part-time faculty members whose usual classes were canceled or dropped from the schedule. (Tr. 89–90, 1026–1027, 1126, 1157–1159; GC Exh. 21(b), art. VIII; compare R. Exh. 1, art. VII, sec. 2 and GC Exh. 34 (July 2011 instructional continuity proposal prepared by the College).) The College also modified contract language about disciplinary procedures to eliminate the requirement that disciplinary action be based on "just cause," and modified the language about the scope of the contract to state that the contract constituted the entire agreement between PFAC and the College, such that the College had no obligation to bargain about any matters (including any past practices) while the contract was in effect. (GC Exh. 21(b), arts. X and XVI; compare R. Exh. 1, arts. X and XIV.)

Regarding the NIDs, the College stood firm on its rejection of virtually all NIDs unless they were consistent with the College's March 30 proposal. Specifically, the College handled the NIDs as follows:

Existing (2006-2010) Contract Section	**NID Reached (date of NID)**	**Incorporated in the College's December 2011 Contract Proposal?**
Article IV, Section 1–President–Association Meetings	NID reached–accept language in March 30 contract proposal (April 20, 2011)	Yes
Article IV, Section 2–Bulletin Boards/Website	NID reached–maintain existing contract language (April 22, 2011)	No. College returned to its March 30 proposal, which was limited to bulletin board access.
Article IV, Section 3(A)–notification of full-time positions	NID reached–accept language in April 22 proposal (April 22, 2011)	No. College returned to its March 30 proposal (with minor language modifications).
Article IV, Section 3(B)–application processing for full-time positions	NID reached–accept language in March 30 contract proposal (April 20, 2011)	Yes
Article IV, Sections 4, 5 & 7–office space, copy machine, meeting space	NID reached–maintain existing contract language, which was identical to the language in the March 30 contract proposal (April 20, 2011)	Yes
Article IV, Section 6–campus mail	NID reached (June 9, 2011)	No. College returned to its March 30 proposal.
Article IV, Section 8–personnel file	NID reached (June 9, 2011)	No. College returned to its March 30 proposal (with minor language modifications).
Article IV, Section 9–evaluation	NID to move this section to another part of the contract. (April 20, 2011) NID reached re: performance evaluation policy statement (September 23, 2011)	No. The College retained the evaluation section in the same part of the contract, and proposed new contract language re: evaluations. The College did not comment on the status of the performance evaluation policy statement.
Article IV, Section 10–bargaining unit eligibility list	NID reached–accept language in March 30 contract proposal (April 20, 2011)	Yes.
Article IV, Section 12–copy of agreement	NID reached (June 9, 2011)	No. Consistent with its March 30 proposal, the College deleted this clause.
Article VI, Section 1–department	NID reached–remove "direc-	No. College returned to its March

[12] Strazewski made recommendations about what language the December proposal should include, but Annice Kelly ultimately drafted the proposal for the College. (Tr. 1121–1122.)

Existing (2006-2010) Contract Section	NID Reached (date of NID)	Incorporated in the College's December 2011 Contract Proposal?
meetings	tors" from meeting list, but otherwise maintain existing contract language (April 20, 2011)	30 proposal.
Article VI, Section 2–joint meeting of full and part-time faculty	NID reached re: meeting procedure (April 20, 2011)	No. College returned to its March 30 proposal (with minor language modifications). However, the NID was similar in nature and content to the March 30 proposal.
Article VI, Section 4-7–search committees for college administration	NID reached - accept language in March 30 contract proposal (April 20, 2011)	Yes, with minor language modifications.
Article VI, Section 8–Payment for committee work	NID reached. Move to Section 9. (April 20, 2011)	Yes, in Section 8. NID language was similar to language in the March 30 contract proposal.
Article VI (new sections)	NIDs reached re: curricular committee (to become Section 8), Board of Trustee faculty representation and training programs (see June 9, 2011)	Curricular committee–yes, in Section 7. NID language was similar to language in the March 30 contract proposal (Section 8). Training programs–yes, in Section 9. NID language was similar to language in the March 30 contract proposal (Section 10). Board of Trustee faculty representation–no (clause deleted).
Article IX, Section 2–grievance informal resolution	NID reached (May 6, 2011)	No. College returned to its March 30 proposal.
Article IX, Section 3–grievance step 2	NID reached– accept language in March 30 proposal (May 6, 2011)	No. The College modified its March 30 proposal to limit the number of PFAC representatives that may attend the step 2 grievance meeting.
Article IX, Section 4–grievance time limits	NID reached (May 2, 2011)	Yes. NID language was identical to language in the March 30 proposal.
Article XII, Section 1–contract administration	NID reached (April 22, 2011)	No. College returned to its March 30 proposal. (See December 2011 proposal, Article XIII, Section 1.)
Article XII, Section 4–union leave	NID reached - maintain existing contract language, but move to a different part of the contract (April 20, 2011)	Yes. (See December 2011 Proposal, Article XIV, Section 4.)

(GC Exhs. 8–9, 21(b); R. Exh. 1.)

Last, the College modified the management-rights clause to strengthen the effects bargaining waiver that it sought from PFAC. Specifically, the December 2011 proposal set forth the following proposed management-rights clause:

> Columbia College Chicago and its Board of Trustees (the "College") retain the sole and exclusive right to determine and manage the College's operations, except as may be limited by a specific, express provision of this Agreement. The College shall not be required to bargain over matters of inherent managerial policy or other managerial rights, including as set forth herein. *Similarly, the College shall not be required to bargain over the effects or impact of its decisions regarding such matters on unit members.* Managerial rights over which the College is not required to bargain include but are in no way limited to:
>
> A. The right to plan, establish, terminate, modify and implement all aspects of educational policies and practices, including curricula; admission and graduation requirements and standards; . . . and the establishment, expansion, subcontracting, reduction, modification, alteration, combination, or transfer of any job, department, program, course, institute or other academic or non-academic activity and the staffing of the activity, except as may be modified by this Agreement.

B. The right to manage the College and direct the College's property, including fiscal and budgetary policy and their implementation . . . except as may be modified by this Agreement.

C. The right to hire, direct, transfer, assign, terminate, layoff, discipline, appoint, reappoint, and evaluate its employees and to establish, modify, and discontinue rules and regulations of procedure, conduct, policies, standards, and practices relating to the performance of work, including workload, scheduling of work and its location and criteria and qualifications for appointment, retention, and promotion of employees, except as may be expressly modified by this Agreement.

This enumeration of managerial rights is not all-inclusive but rather illustrates the type of matters which belong to and are inherent in management and shall not be deemed to exclude managerial rights not specifically listed. *This provision is intended to constitute a clear and unmistakable waiver of any rights [PFAC] might otherwise have to bargain over managerial rights and/or the effects or impact on unit members of the College's decisions with respect to such rights.*

(GC Exh. 21(b), art. II (emphasis added).) The College invited PFAC to notify Strazewski when it was ready to resume Friday morning negotiations. (Tr. 462–463; GC Exh. 21(a).)

h. February 2012—the College declines PFAC's requests for face to face negotiations until PFAC responds to the College's December 2011 contract proposal

On February 13, 2012, Vallera emailed Love to express concern that the parties had not held a face to face bargaining session since October 2011, and to ask for dates that the College would be available to resume face to face negotiations. Vallera asserted that PFAC intended to pick up negotiations from where the parties stood in October 2011, and essentially disregard the College's December 2011 contract proposal because PFAC believed it to be regressive and in violation of the law. (GC Exh. 24.)

On February 16, Strazewski replied to Vallera. Strazewski reminded Vallera that Love was no longer part of the College's bargaining team, and accordingly asked Vallera to direct future communications about bargaining to him. Strazewski then asserted that PFAC's own actions led to the current bargaining process of exchanging proposals, and asked PFAC to either provide the College with comments about the College's December 2011 contract proposal, or alternatively make a counterproposal. (GC Exh. 25.)

After Strazewski's February 16 email, the parties came to a stalemate, with PFAC periodically asking the College to resume face to face bargaining sessions that picked up from where the parties left off in October 2011, and with the College responding that bargaining was taking place in writing, and that PFAC needed to respond to the College's December 2011 contract proposal to move bargaining forward. (GC Exhs. 26–31; see also Tr. 1034, 1036, 1154 (explaining the College's position that it was engaging in bargaining by presenting its December 2011 contract proposal to PFAC for review and response).) However, on April 24, PFAC changed its position slightly when renewed its request that the College propose some dates to meet for bargaining, but stated that it would respond to the College's December 2011 proposal at the requested face-to-face negotiation session. (Tr. 109; GC Exh. 32.)

i. June 2012—the College agrees to resume face-to-face negotiations

On June 13, 2012, Strazewski contacted Vallera to schedule a bargaining session on a variety of issues, including bargaining for a successor collective-bargaining agreement. (Tr. 1041; R. Exh. 61.) The parties thereafter resumed face-to-face negotiations, with the first session after the standoff occurring on June 25, 2012. (R. Exh. 60.)

3. Discussion and analysis

The Board has recognized that the obligation to meet for bargaining is of central importance. As the Board has stated, the obligation to bargain "encompasses the affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and conferring. Agreement is stifled at its source if opportunity is not accorded for discussion or so delayed as to invite or prolong unrest or suspicion. It is not unreasonable to expect of a party to collective-bargaining that he display a degree of diligence and promptness in arranging for collective-bargaining sessions when they are requested, and in the elimination of obstacles thereto, comparable to that which he would display in his other business affairs of importance." *J. H. Rutter-Rex Mfg. Co.*, 86 NLRB 470, 506 (1949); see also *Caribe Staple Co.*, 313 NLRB 877, 893 (1994) (noting that "considerations of personal convenience, including geographic or professional conflicts, do not take the precedence over the statutory demand that the bargaining process take place with expedition and regularity"). In light of the importance of the obligation to meet for bargaining, the Board has held that a party that limits, delays or refuses meetings for bargaining violates Section 8(a)(5) of the Act. *Lancaster Nissan*, 344 NLRB 225, 227 (2005), enfd. 233 Fed. Appx. 100 (3d Cir. 2007).

In this case, the Acting General Counsel alleges that starting on February 16, 2012, the College unlawfully refused to meet and bargain with PFAC about a successor collective-bargaining agreement. The relevant facts regarding that allegation are not in dispute. After receiving and reviewing the College's December 2011 contract proposal, PFAC contacted the College on February 13, 2012, to schedule dates to resume face-to-face negotiations. In the same communication, PFAC rejected the College's December 2011 contract proposal as regressive and unlawful, and asserted that the parties should pick up negotiations from where they stood in October 2011. Instead of proposing dates for a face to face meeting as PFAC requested, on February 16, 2012, the College set a precondition that PFAC either respond to its December 2011 contract proposal or make a counterproposal before the parties resumed face-to-face negotiations.[13] The College did not abandon its precondition until June 13, 2012. (FOF, secs. h–i, supra.)

[13] I am not persuaded by the College's argument that it was not setting a precondition to face-to-face negotiations, but rather was attempt-

The College's decision to set a precondition for PFAC to satisfy before the College would resume face-to-face negotiations was unlawful. Under Section 8(d) of the Act, employers and unions alike have a mutual obligation to meet at reasonable times and confer in good faith about mandatory subjects of bargaining such as wages, hours, and terms and conditions of employment. *Riverside Cement Co.*, 305 NLRB 815, 818 (1991) (discussing Sec. 8(d)), enfd. 976 F.2d 731 (5th Cir. 1992). Since the parties' negotiations for a successor collective-bargaining agreement implicated a variety of mandatory subjects of bargaining, the College was obligated to meet with PFAC at a reasonable time for contract negotiations without preconditions. Id. at 818–819 (finding that it was unlawful for an employer to precondition bargaining on the presence of a Federal mediator); see also *Vanguard Fire & Security Systems*, 345 NLRB 1016, 1017 (2005) (finding that it was unlawful for the employer to precondition bargaining on the union providing a detailed proposal and agenda), enfd. 468 F.3d 952 (6th Cir. 2006); *Beverly Farm Foundation*, 323 NLRB 787, 793 (1997) (noting that an employer that responds to a bargaining invitation by insisting on "negotiating by mail or demanding that a union submit its proposals in writing has unlawfully refused to bargain"), enfd. 144 F.3d 1048 (7th Cir. 1998). The College failed to fulfill its obligation to meet and bargain with PFAC from February 16 to June 13, 2012 (at a minimum),[14] and I therefore find that the College violated Section 8(a)(5) and (1) of the Act as alleged in paragraph XI(c) of the complaint.

B. Bargaining Over the Impact and Effects of Course Credit Hour Changes

1. Complaint allegations

The complaint alleges that since on or about February 21, 2012, Respondent has failed and refused to bargain with PFAC about the impact and effects of Respondent's implementation of its decision to reduce course credit hours in several departments. (GC Exh. 1(ff), par. IX(b) (alleging violation of Sec. 8(a)(5) and (1).)

2. Findings of fact

a. Overview of course credit hours

Under the collective-bargaining agreement, part-time faculty members are paid wages for each course that they teach, with the wage rate depending on the number of credit hours that the course requires, and the total number of credit hours that the faculty member has taught at the College (with more experienced faculty earning a higher wage). By way of example, in the 2009–2010 academic year, the College paid part-time faculty between $3756 and $4700 for each three-credit hour course that they taught. The College prorates the pay rate per credit hour if the faculty member teaches a course that is more, or less, than three credit hours. (R. Exh. 1, art. XI.)

As part of its ongoing operations (including evaluating and updating its curricula), the College occasionally changes the number of credits that it awards for particular courses. Course credit hour changes occur to account for (among other possibilities): changes to the course content; changes in, or a reassessment of, how the course is taught;[15] and changes in the curriculum for a particular department or major (e.g., to make room for a new course, a department reduces time spent on other courses). (Tr. 540–541, 622; R. Exh. 10.)

b. Prior disagreements between PFAC and the College concerning course credit hours

Although changes to course credit hours and other curriculum changes (such as changes to course prerequisites and the classification of a course as required or elective) can affect the terms and conditions of employment of part-time faculty at the College,[16] PFAC has been inconsistent with requesting impact/effects bargaining for these types of changes. (Tr. 537–538, 592, 604–605, 655, 668.)

However, on October 22, 2010, the College and PFAC reached a settlement in Case 13–CA–046171, in which the College agreed to meet and bargain with PFAC about the effects of changes that the College made to the course credit hours for certain courses in the photography department. (Tr. 40–41, 463; GC Exh. 4; see also GC Exh. 3 (unfair labor practice charge filed on July 23, 2010).) Consistent with the October 2010 settlement, the College and PFAC bargained about the effects of course credit hour reductions in approximately 15 courses in the photography department. (See, e.g., R. Exh. 4.) During those discussions, the College notified PFAC that it planned to reduce the credit hours for the following two courses in the 2011–2012 academic year: Art Director/Commercial Photography (course 22–3500); and Art Director/Copywriter Team (course 22–3525). (R. Exhs. 4–5.) At a bargaining session on March 4, 2011, PFAC promised to respond in writing to the information that the College provided about changing the credit hours for those two courses, but ultimately did not pursue the matter further. (R. Exh. 6.)

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ing to negotiate with PFAC about how to resume negotiations. (See R. Posttrial Br. at 57–58.) As explained in the findings of fact, the College was adamant that it would not resume face-to-face negotiations until PFAC either responded to the College's December 2011 contract proposal or submitted a counterproposal. (FOF, sec. g, supra.)

[14] The Acting General Counsel and PFAC allege that from June 2012, onward, the College continued to violate Sec. 8(a)(5) of the Act by offering only limited time periods for bargaining. (See GC Posttrial Br. at 18–19; PFAC Posttrial Br. at 35.) I need not rule on that theory since it will not materially affect the remedy in this case.

[15] The College has a formula that calculates credit hours based on the number of hours that the professor spends with the students (contact hours), and the type of instruction that occurs during those contact hours. Thus, for example, a lecture/discussion course receives 1 credit hour for each contact hour per week, a studio course receives 1 credit hour for every 1.33 contact hours per week, and a laboratory course receives one credit hour for every 2 contact hours per week. (R. Exh. 10.)

[16] Changes in course credit hours have a direct effect on PFAC members because the College uses course credit hours to calculate the wages that it pays part-time faculty for the courses that they teach, and because PFAC members earn higher wages as their total number of credit hours taught increases. (Tr. 39, 126–127, 537–538; R. Exh. 1.) Meanwhile, the example curriculum changes noted above (changes to prerequisites and whether students are required to take a course) can have an effect on how many students sign up for a particular course, and in turn reduce (or increase) course assignment opportunities for PFAC members. (Tr. 591, 610–611.)

c. The school of fine and performing arts decides to change the number of credit hours awarded for certain courses

In the same timeframe (starting in spring 2010), College administrators in the school of fine and performing arts began implementing a strategic plan to evaluate that school's curriculum. (Tr. 576, 586.) As part of that process, departments reviewed their existing courses to determine whether they were classified correctly (e.g., as a lecture/discussion, a studio, a laboratory), and whether other modifications were warranted (such as updated course content, a different course description, etc.).[17] (Tr. 576–578, 599, 622–623, 651; R. Exh. 18; see also Tr. 604, 607 (explaining that a change to an existing course could include a change to the number of credit hours or to course pre-requisites, or more minor changes to the course description or title).)

The school of fine and performing arts ultimately decided to reduce the credit hours for the following 10 courses, with the changes to take effect in the 2011–2012 school year: Accounting; Art Director/Commercial Photography; Art Director/Copywriter Team; Screenwriting Workshop; Adaptation in LA; Acquiring Intellectual Property/LA; Theory, Harmony & Analysis I; Theory, Harmony & Analysis II; Directing I; and Pro Survival & How to Audition.[18] (R. Exh. 11 (indicating that the school also increased the credit hours for 11 other courses).) In various semesters since 2006, part-time faculty taught class sections for each of the 10 courses slated for reduced credit hours.[19] (R. Exh. 12.)

In March 2011, the College posted its fall 2011 course offerings on OASIS (an online course catalog) for students to review, including the courses that would count for a reduced number of credit hours. (Tr. 562–563.) On May 2, 2011, the College notified part-time faculty members of their fall 2011 class assignments, including several class assignments to the courses that had reduced credit hours. (Tr. 578–584; R. Exhs. 13–15.)

d. PFAC asks the College to bargain over the effects of the changes to course credit hours

On December 20, 2011, Diana Vallera emailed Louise Love because she learned that course credit hours may have been reduced in various departments. Vallera asked Love for a list of all classes that had their credit hours reduced in the past 12 months, and requested that the College bargain with PFAC over the impact and effects of its decision to reduce the credit hours for certain courses. (GC Exh. 49.) On January 20, 2012, Love acknowledged receiving Vallera's email, and advised Vallera that the College was preparing a reply. (GC Exh. 50.)

e. The arbitrator's decision in employee R.P.'s grievance about teaching assignments

On February 12, 2012, an arbitrator issued an award in a grievance that part-time faculty member R.P. filed against the College. R.P. claimed that the College violated the collective-bargaining agreement when it did not assign R.P. a class to teach in the fall 2010 semester (R.P. was initially assigned a class, but the College withdrew that assignment before the fall 2010 semester began). (GC Exh. 54.) After reviewing the collective-bargaining agreement, the arbitrator found that the agreement "carefully established that an adjunct, or part-time, instructor is employed only when he or she is teaching a course during a finite period of time. Between teaching assignments the adjunct has no status as an employee. He or she is hired solely for the period of time during which the teaching occurs."[20] (GC Exh. 54, p. 10.) Accordingly, the arbitrator ruled that the College did not violate the collective-bargaining agreement when it withdrew R.P.'s teaching assignment, because R.P. was an applicant for employment and thus "had no

[17] The school of fine and performing arts also asked its departments to review their degree requirements to ensure that they were consistent with national standards and College policy. (Tr. 586–588.) Through that review, which was completed by December 2010, some departments reduced their credit hour requirements to conform to a national standard of 36 to 42 credits for a BA degree. (Tr. 587–590; R. Exh. 17 (indicating, for example, that BA's in Art History and Dance would each require 42 credits) (down from 51 and 57 credits, respectively).) Although the reduction in course credits required for certain majors could affect PFAC members (e.g., by changing a required course for a major to an elective, which could reduce the number of students who enrolled in the course), PFAC did not ask the College to bargain about this issue. (Tr. 591–592.)

[18] For 3 of the 10 affected courses in the school of fine and performing arts (Screenwriting Workshop; Adaptation in LA; and Acquiring Intellectual Property), the reduction in credit hours (from three to two credits) only applied to graduate students taking the courses. Undergraduates taking those three courses continued to earn three credits, and the part-time faculty member continued to be paid for teaching a three-credit course. (Tr. 572–575.)

[19] Separately in March 2011, the school of media arts decided to reduce the credit hours (from three credits to two credits) for the following two courses in the journalism department: Local Government Politics Seminar; and State and National Government Politics Seminar. (Tr. 513–514, 528.)

[20] In support of his finding that part-time faculty members are employed only when they are teaching a course during a finite period of time, the arbitrator cited the following provisions from the collective-bargaining agreement (among others):

> The final decision of who teaches each course is the sole prerogative of the department Chairperson. (Article VII, Section 2);
>
> The receipt and submission of a teaching availability form by a unit member does not obligate the College in any way to provide an appointment or a particular assignment to that unit member. . . . In addition, every form must include the following statement: "Submission of this form constitutes a request, not a guarantee of teaching assignment. Further, since course enrollment, as well as your qualifications and evaluations, determine teaching assignments, no assignment can be considered final until student registration is completed. (Article VII, Section 4); and
>
> The College may suspend, with or without pay, discharge, or take other appropriate disciplinary action against a unit member for just cause. . . . For purposes of this Agreement, "discharge" shall mean termination of employment during a semester and shall not refer to the failure to rehire or to renew a faculty member's appointment to teach for future semesters. This Article X shall not apply to decisions by the College not to rehire or not to renew a unit member's appointment to teach future semesters. (Article X, Section 1).

(GC Exh. 54, pp. 2–3, 10–12.)

standing to question his future employment." (GC Exh. 54, p. 12.)

f. The College responds to PFAC's request for effects bargaining

On February 21, 2012, Associate Vice President for Academic Affairs Susan Marcus sent Vallera a list of courses for which the College reduced the number of credit hours awarded. The list included the 10 courses that the school of fine and performing arts modified after its curriculum review, as well as 2 additional courses from the school of media arts (journalism department). (GC Exh. 51; see also Tr. 513–515, 540–541 (explaining that the journalism department reduced the course credit hours for two seminars on local, State, and national Government to make room for a new course about digital journalism).)

That same day, Associate Provost for Faculty Affairs Leonard Strazewski notified Vallera that although the College did not believe that it had an obligation to bargain with PFAC about the issue of course credit hour reductions,[21] the College was willing meet to discuss the issue if PFAC first gave the College a proposal regarding the effects, and a list of PFAC members that have been affected by the changes to course credit hours. (GC Exh. 52; see also Tr. 1131.)

Vallera responded to Strazewski's email on March 23, 2012. Vallera renewed PFAC's request that the College bargain, but asserted that the bargaining should cover both the decision to change course credit hours and the effects of that decision. (GC Exh. 30; compare GC Exh. 49 (requesting only effects bargaining).) Regarding Strazewski's request that PFAC provide a list of bargaining members who were affected by the changes to course credit hours, Vallera responded that the College should have that information, and requested that the College send PFAC a list of all part-time faculty members who had taught the courses with reduced credit hours since spring 2011. (GC Exh. 30.)

On April 16, 2012, Strazewski wrote to Vallera to reiterate the College's position that it did not believe it had an obligation to bargain with PFAC about the changes to course credit hours. Strazewski also renewed the College's request that PFAC identify any bargaining unit members who were affected by the credit hour changes, since the College's view was that no bargaining unit members were affected. In the College's view, it could not "fulfill any bargaining obligation unless and until the Union responds to Columbia's information request by specifying what it wants to bargain and who it believes was affected." (GC Exh. 31 (also noting that the College would respond to PFAC's March 23, 2012 information request in the order that it was received).)

On May 4, 2012, a breakthrough of sorts occurred when Strazewski notified PFAC that it was willing to meet to discuss the reductions to course credit hours, notwithstanding the College's belief that no effects bargaining was required and the parties' unresolved dispute about who should identify the bargaining unit members affected by the changes. (R. Exh. 58.) PFAC and the College accordingly participated in a bargaining session about the reductions to course credit hours (and other issues) on June 25, 2012, and again on July 20, 2012. (R. Exhs. 60, 62.)

3. Discussion and analysis

The Board has held that "[a]n employer has an obligation to give a union notice and an opportunity to bargain about the effects on union employees of a managerial decision even if it has no obligation to bargain about the decision itself." *Allison Corp.*, 330 NLRB 1363, 1365 (2000) (citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981)). As part of its effects bargaining obligations, the employer has a duty to give preimplementation notice to the union to allow for meaningful effects bargaining. *Allison Corp.*, 330 NLRB at 1366.

There is no dispute that by March 2011, the College had made a decision to reduce the number of credit hours that it would award for 12 courses. Although the College was aware of PFAC's concerns about course credit hour reductions (having just settled a case in October 2010 about similar reductions in the photography department), it did not notify PFAC before it implemented the March 2011 changes to course credit hours for 10 of the 12 courses. (FOF, sects. b–c, supra (noting that the College did advise PFAC that it planned to reduce the credit hours for Art Director/Commercial Photography, and Art Director/Copywriter Team).) When Vallera asked the College in December 2011 to engage in effects bargaining, on February 21, 2012, the College agreed to bargain, but only on the precondition that PFAC first submit a proposal regarding the effects, and a list of PFAC members that have been affected by the changes to course credit hours. (FOF, sec. f, supra.)

The College's decision to set preconditions for PFAC to satisfy before the parties engaged in effects bargaining was unlawful. Under Section 8(d) of the Act, employers and unions alike have a mutual obligation to meet at reasonable times and confer in good faith about mandatory subjects of bargaining such as wages, hours and terms and conditions of employment. *Riverside Cement Co.*, 305 NLRB at 818 (discussing Sec. 8(d)). Since the changes to course credit hours affected the wages and terms and conditions of employment of PFAC members, the changes were mandatory subjects of bargaining, and the College therefore was obligated to meet with PFAC at a reasonable time for effects bargaining without preconditions.[22] Id. at 818–

[21] Strazewski's assertion was consistent with the position that the College took when it submitted a position statement to the Board on February 23, 2012, in response to an unfair labor practice charge that PFAC filed in Case 13–CA–073487 to allege that the College refused to respond to its information request or engage in effects bargaining about the College's decision to reduce the credit hours that it awarded for certain courses. (GC Exh. 53 (position statement); GC Exh. 1(c) (January 30, 2012 charge in Case 13–CA–073487).) In its position statement, the College cited the arbitrator's decision in R.P.'s grievance to support its assertion that "effects bargaining is inappropriate because bargaining unit members are not guaranteed continued employment and do not have standing under the contract to question any future reassignments of classes." (GC Exh. 53, p. 5.)

[22] I also note that the arbitrator's February 12, 2012 decision did not relieve the College of its obligation to engage in effects bargaining with PFAC. The College has admitted that notwithstanding the arbitrator's decision, PFAC represents all members of the PFAC bargaining unit regardless of whether they are currently teaching. (GC Exh. 94(a), p. 3

819 (finding that it was unlawful for an employer to precondition bargaining on the presence of a Federal mediator); see also *Vanguard Fire & Security Systems*, 345 NLRB at 1017 (finding that it was unlawful for the employer to precondition bargaining on the union providing a detailed proposal and agenda). To the extent that the College relented in May 2012 and agreed to participate in effects bargaining, that change in position did not correct the prior unlawful refusal to bargain because by that point, meaningful effects bargaining was precluded due to the College's failure to give PFAC preimplementation notice of the credit hour changes, and due to the delay caused by the unlawful preconditions that the College set before it agreed to engage in effects bargaining.

The College offered multiple arguments for why its response to PFAC's request for effects bargaining was lawful, but only one of the College's arguments has merit. As part of its defense, the College maintains that PFAC waived its right to effects bargaining about the course credit hour reductions because it did not request such bargaining after receiving notice of the changes. In making that argument, the College asserts that PFAC should have requested bargaining in spring 2011, when the College posted its fall 2011 course listings to its online course catalog and notified PFAC members of their fall 2011 class assignments. See *Medicenter, Mid-South Hospital*, 221 NLRB 670, 678 (1975) (explaining that once a union receives adequate notice of a proposed change to the terms and conditions of employment, the burden shifts to the union to pursue bargaining on the matter if it wishes to do so).

I find that the College's defense has merit regarding the course credit hour reductions for Art Director/Commercial Photography, and Art Director/Copywriter Team. For those two courses, it is undisputed that the College notified PFAC in February 2011 that the credit hours would be reduced. Since PFAC acknowledged receiving that notification, but then took no further action, I agree that the College did not violate the Act when it refused to engage in effects bargaining about the changes to those two courses when PFAC revisited the issue several months later. By contrast, I do not find that PFAC received adequate notice (in spring 2011 or otherwise) about the College's plan to reduce credit hours for the remaining 10 courses at issue.[23] The College did not notify PFAC directly about those changes, and the evidentiary record does not show that the news of the changes made its way to PFAC by other means until months after the changes took effect. See *Medicenter, Mid-South Hospital*, 221 NLRB at 678 (collecting cases that stand for the proposition that if a union receives adequate notice of an employer's intentions when there remains sufficient opportunity to bargain, the employer cannot be faulted for failing to provide formal notification). PFAC therefore cannot be faulted for the time that passed before it learned of the credit hour changes and asked the College to engage in effects bargaining.[24]

(position statement); GC Exh. 94(b), p. 10 (same).) The College has contended, however, that the arbitrator's decision establishes that PFAC waived its right in the existing collective-bargaining agreement to bargain about the effects of academic changes slated for future semesters. (GC Exh. 94(b), p. 10.)

I disagree. By its terms, the arbitrator's decision at most addressed the right of individual employees to contest teaching assignments through the grievance process. The arbitrator's decision did not address PFAC's right to represent the interests of its members through effects bargaining.

[23] Those 10 courses are: Accounting; Screenwriting Workshop; Adaptation in LA; Acquiring Intellectual Property/LA; Theory, Harmony & Analysis I; Theory, Harmony & Analysis II; Directing I; Pro Survival & How to Audition; Local Government Politics Seminar; and State and National Government Politics Seminar.

[24] The College missed the mark with the remaining arguments that it raised about whether it violated the Act by failing to engage in effects bargaining about the course credit hour reductions. First, the College argued that it did not need to engage in effects bargaining because the changes to course credit hours were not material, substantial and significant. While it is true that the Board has accepted such a defense in the past where the disputed changes to working conditions are essentially de minimis (see, e.g., *Berkshire Nursing Home, LLC*, 345 NLRB 220, 221 (2005)), that defense does not apply here because the changes to course credit hours are material, substantial and significant insofar as course credit hours are used to calculate the wages that PFAC members are paid for the classes that they teach. (FOF, sect. a, supra.)

Second, the College argues that the arbitrator's decision in employee R.P.'s grievance established that PFAC members do not have the right to future course assignments, or (by extension) the right to expect that particular courses will carry a certain number of credit hours. I disagree. As a preliminary matter, the College has admitted that notwithstanding the arbitrator's decision, PFAC represents all members of the PFAC bargaining unit regardless of whether they are currently teaching. (GC Exh. 94(a), p. 3 (position statement); GC Exh. 94(b), p. 10 (same).) Perhaps more important, by its terms, the arbitrator's decision at most addressed the right of individual employees to contest teaching assignments through the grievance process. The arbitrator's decision did not address or limit PFAC's right to bargain on behalf of its members over the effects of decisions that implicate working conditions.

Third, the College maintained that PFAC waived its right to request effects bargaining about the changes to course credit hours because the College had a past practice of making similar changes without any objection from PFAC. The College is correct that PFAC did not consistently request bargaining when the College made changes to its curriculum (including some significant curriculum changes, such as the College's decision to lower the number of credits required for majors in the school of fine and performing arts). However, whatever PFAC's practices might have been regarding curriculum changes, the record is clear that when it came to course credit hour reductions (as here), PFAC expected and demanded effects bargaining, as indicated by the Board charge and eventual 2010 settlement in Case 13–CA–046171 regarding course credit hour changes in the photography department. (FOF, sec. b, supra.)

And fourth, the College asserted that PFAC waived its right to effects bargaining about course credit hour changes in the existing collective-bargaining agreement. That waiver argument falls short because the College's own actions demonstrate that the existing collective-bargaining agreement does not contain a clear and unmistakable waiver of PFAC's right to engage in effects bargaining. See *Kingsbury, Inc.*, 355 NLRB 1195, 1206 (2010) (explaining that it is the respondent's burden to show that the contractual waiver is explicitly stated, clear and unmistakable); see also *Omaha World-Herald*, 357 NLRB 1870, 1872 (2011) (endorsing the proposition that clear and unmistakable evidence of a parties' intent to waive a duty to bargain is gleaned from all of the surrounding circumstances, including bargaining history, actual contract language and the completeness of the collective-bargaining agreement). Indeed, when the College and PFAC settled Case 13–CA–046171, the College agreed to bargain with PFAC about the effects of

Based on the foregoing analysis, I find that the College violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with PFAC about the impact and effects of College's implementation of course credit hour reductions for the following 10 courses: Accounting; Screenwriting Workshop; Adaptation in LA; Acquiring Intellectual Property/LA; Theory, Harmony & Analysis I; Theory, Harmony & Analysis II; Directing I; Pro Survival & How to Audition; Local Government Politics Seminar; and State and National Government Politics Seminar.[25]

C. Bargaining Over the Impact and Effects of Prioritization

1. Complaint allegations

The complaint alleges that since on or about May 8, 2012, Respondent has failed and refused to bargain with PFAC about the impact and effects of Respondent's implementation of its prioritization plan to restructure operations. (GC Exh. 1(ff), par. IX(d) (alleging violation of Sec. 8(a)(5) and (1).)

2. Findings of fact

a. The prioritization process

In 2011, the College, with the assistance of a consultant group, engaged in a self-study of its academic programs, support services and operating functions, with the goal of making strategic decisions about how the College should use its resources (i.e.., should the College invest more resources in a program? Less? The same?). The College referred to the self-study as the prioritization process. (GC Exhs. 58(a)–(b); see also Tr. 131, 137–139, 141, 1071–1072.)

Early in the prioritization process, the College president appointed 12 faculty members (from a pool of candidates that had been nominated) to serve on a committee (the Academic Team) that would evaluate the College's academic programs. (GC Exhs. 58(a)–(b).) The College appointed new PFAC member B.O. to serve on the Academic Team, but did not consult with PFAC before making that appointment. (Tr. 133–134.)

PFAC became concerned that it was not part of the dialogue at the College about the prioritization process. (Tr. 134; see also GC Exh. 55.) In response, on November 4, 2011, Vice President for Academic Affairs Louise Love sent an email to campus personnel to assure PFAC members "that the voice of part-time faculty is very much part of the prioritization process." Love cited B.O.'s placement on the Academic Team, and also cited part-time faculty hiring and retention data as evidence of the College's commitment to its part-time faculty. (GC Exh. 55.)

b. PFAC's January 3, 2012 request for effects bargaining regarding changes arising from the prioritization process

On January 3, 2012, Vallera emailed Love to assert that the College had an obligation to bargain with PFAC about the impact and effects of any changes that the College planned to make based on the prioritization process if those changes would affect the terms and conditions of employment of part-time faculty members. Vallera maintained that such bargaining needed to occur in a meaningful manner and at a meaningful time, and requested that a meeting for bargaining be scheduled in early January 2012. Finally, Vallera asked the College to provide PFAC with information about recommendations produced through the prioritization process, and information about any written communication that the College was having with PFAC members that involved the collective-bargaining agreement. (GC Exh. 56.)

Love responded to Vallera on January 9, 2012. Regarding PFAC's information request, Love encouraged Vallera to check the prioritization process homepage on the College's faculty intranet, where the College would be posting prioritization recommendations. As for PFAC's request for bargaining, Love stated that effects bargaining would only be triggered if and when the College made a decision to implement a recommendation affecting the terms and conditions of employment of PFAC members. Love asserted that the College had not yet made any firm decisions related to prioritization, but assured Vallera that the College was "committed to giving proper notice, and upon request, engaging in effects bargaining" in the event that the College did decide to implement recommendations affecting PFAC members. (GC Exh. 57; see also Tr. 136–137.)

c. PFAC's March 14, 2012 request for effects bargaining regarding changes arising from the prioritization process

On March 14, 2012, Vallera wrote to Love to renew PFAC's request that the College bargain with PFAC "over the decision and/or effects of any changes related to the prioritization process." (GC Exh. 59, p. 2.) Vallera reiterated PFAC's position that effects bargaining needed to occur in a meaningful manner and at a meaningful time, and pointed out that the prioritization process already had produced several recommendations to restructure or eliminate programs and make changes to curriculum and personnel. (GC Exh. 59, p. 3; see also GC Exh. 58(b)

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credit hour changes to courses in the photography department. Further, in light of that settlement, the College immediately proposed that PFAC waive its right to effects bargaining in the successor agreement. Those actions would not have been necessary if the existing agreement had an effects bargaining waiver.

[25] The College expressed the concern that an adverse ruling on this effects bargaining issue would harm its ability to run its business and conduct its most basic functions. (R. Posttrial Br. at 48–49.) I do not share the College's stark view of the practical effects of my decision here, because as previously noted, bargaining over mandatory subjects is required where the contemplated change is material, substantial and significant. Moreover, the Board rejected a similar "practical effects" argument in *Public Service Co. of Oklahoma* when it explained:

> The need to notify, bargain and compromise with the Union in the face of the perceived need to change because of contractual and statutory restrictions on the employer's right to make unilateral changes: all such limits may be characterized as a part of the inefficiencies of American industrial relations, workplace regulation and general governmental restriction. For good or ill, however, Congress in its wisdom has crafted the Act and, as interpreted by the Board under review by the courts, it is the law of the land. The argued need for an employer to have the right to take unlimited actions regarding the unit is not a sufficient basis under the Act for insisting on contract proposals which essentially set aside the bargaining rights of a union representing an employer's employees.

334 NLRB 487, 498 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003).

(noting that prioritization team recommendations were due to the College president in February/March 2012); GC Exh. 58(c) (recommendations from the Office of the Provost/Academic Affairs, including several recommendations to modify academic programs).) Since the recommended program changes would likely affect the work assignments, job qualification requirements and job availability for PFAC members, PFAC requested immediate decisional and effects bargaining over the prioritization process because further delay could make it impossible to engaged in meaningful negotiations. (GC Exh. 59, p. 4; see also Tr. 144–147.)

d. The College's May 8, 2012 response to PFAC's request for effects bargaining

On May 8, 2012, interim associate provost Leonard Strazewski responded to Vallera's request that the College bargain with PFAC about the prioritization process. Strazewski began stating that the prioritization process had only produced recommendations for discussion, and thus the College had not made any or implemented any final decisions. However, Strazewski went on to assert that in any event, the College was not obligated to engage in decisional bargaining about the prioritization process because the management-rights clause in the collective-bargaining agreement gave the College sole discretion to establish, modify or terminate all aspects of educational policies and practices. (GC Exh. 59, p. 1.)

Strazewski also maintained that the College did not need to engage in effects bargaining concerning the prioritization process. In the College's view, the arbitrator's decision in employee R.P.'s grievance established that PFAC did not have standing to bargain about the potential effects that changes proposed through the prioritization process could have on work assignments, job qualification requirements, and job availability for PFAC members. (See sec. B(2)(e), supra.) Strazewski also maintained that PFAC waived its right to bargain over the impact and effects of those changes because the College had a history of using its sole discretion to modify its curriculum and set job qualifications, and the collective-bargaining agreement set forth procedures that the parties agreed to follow when a faculty member is no longer qualified to teach a course that has been modified. Strazewski therefore explained that the College "does not believe that any form of bargaining would be appropriate in the event that it chooses to move forward with its Prioritization recommendations." (GC Exh. 59, pp. 1–2; see also Tr. 1131.)

e. The College concludes the first phase of the prioritization process

On May 23, 2012, the College president posted his prioritization recommendations[26] (titled "Focus 2016—Blueprint for Action") on the faculty intranet for review, and also for comment at a community listening session scheduled for May 25. (GC Exhs. 60(a)–(b).) On June 19, the College president posted his revised prioritization recommendations. (GC Exh. 61.) On June 29, 2012, the College board of trustees announced that it reviewed the president's recommendations, and notified the college community that the senior vice president "will be responsible for organizing a college-wide effort to carry out the ambitious multi-year program outlined in the recommendations." (GC Exh. 62.)

3. Discussion and analysis

The Board has held that "[a]n employer has an obligation to give a union notice and an opportunity to bargain about the effects on union employees of a managerial decision even if it has no obligation to bargain about the decision itself." *Allison Corp.*, 330 NLRB at 1365. As part of its effects bargaining obligations, the employer has a duty to give preimplementation notice to the union to allow for meaningful effects bargaining. *Allison Corp.*, 330 NLRB at 1366.

As described in the findings of fact, the College's prioritization process was a significant project that implicated all facets of the College's programs and operations. Because of that fact, it was certainly understandable that PFAC was interested in having an active role in the process, and in advocating for the interests of its members as the prioritization process moved forward.

The College, as established by the record, chose not to involve PFAC in the prioritization process beyond assuring PFAC that it was taking the concerns of PFAC members into account. The College offered several reasons for its approach on May 8, 2012, when it rejected PFAC's request for effects bargaining about prioritization, but the reason that carries the day here is a simple one: PFAC's request for effects bargaining was premature. In 2011 and early 2012, the prioritization process involved collecting data, evaluating programs, and developing recommendations for how the College should allocate its resources in the future. The College president "decided" what recommendations to forward to the board of trustees in June 2012, and the board of trustees accepted those recommendations on June 29, 2012. When it made its decision, the board of trustees notified the College community that the College's senior vice president would be responsible for "organizing a college-wide effort to carry out the ambitious multi-year program outlined in the recommendations." (FOF, sec. f, supra.) June 29, 2012, therefore, was the earliest date that the College actually made a decision to implement any recommendations that arose from the prioritization process. Accordingly, PFAC's January 3 and March 14, 2012 requests for effects bargaining about prioritization were indeed premature, and the College's refusal to engage in effects bargaining on May 8, 2012 (several weeks before the board of trustees approved the prioritization recommendations), did not violate the Act. I therefore recommend that the allegation in paragraph IX(d) of the complaint be dismissed.[27]

[26] In its prioritization paperwork, the College described the president's report both as "decisions" and as "recommendations." (GC Exhs. 58(b), 60(a), 61.) There is no dispute, however, that the president's report needed to go to the board of trustees for approval. (GC Exhs. 58(b), 62.)

[27] The parties did not fully litigate whether the College and PFAC engaged in effects bargaining about prioritization after June 29, 2012. I therefore take no position on that issue.

D. Respondent's Network and Computer Use Policy

1. Complaint allegations

The complaint alleges that since December 8, 2011, Respondent has maintained an overbroad work rule (the Network and Computer Use Policy), thereby interfering with, restraining, and coercing employees in the exercise of rights guaranteed by Section 7 of the Act. (GC Exh. 1(ff), par V(a) (alleging a violation of Sec. 8(a)(1) of the Act).)

The complaint also alleges that on or about December 21, 2011, and January 5, 2012, Respondent selectively and disparately applied its Network and Computer Use policy by applying those rules only against employees who voice their support for unions. (GC Exh. 1(ff), par. V(b) (alleging a violation of Sec. 8(a)(1) of the Act).)

2. Findings of fact

a. The College's Network and Computer Use Policy

In connection with the information technology that it provides to faculty, staff, and students, the College maintains a Network and Computer Use Policy. The policy covers a wide range of topics, including authorized use of the College's information technology and network resources and licensing guidelines. (GC Exh. 72(a).) The Network and Computer Use Policy states as follows regarding the rights and responsibilities of individuals who use the College's information technology and network:

> The rights and responsibilities discussed in this document are designed to ensure fair access for all users. College information technology is intended for the use of the Columbia College community for teaching, learning and administrative college purposes. Any use that is counter to these purposes or that interferes with such use by others is unacceptable. Each person exercising the privilege of using Columbia College Chicago information technology and network resources accepts certain implied obligations and limitations (such as storage space, bandwidth, time limits, etc.). *Members of the Columbia College Community may not use information technology in ways that interfere with or demean others or that consume excessive college resources.*

(GC Exh. 72(a), Sec. 5.1 (emphasis added).)

b. November 2010 reprimand of employee O.V.

To understand the complaint allegation that the College selectively applied its Network and Computer Use Policy, we must begin with a dispute that arose in 2010, about an email sent by an employee who supported United Staff of Columbia College (US of CC), a staff/employee union established at the college. (Tr. 412.) On November 18, 2010, a group named "Staff for an Open Shop" circulated a newsletter that was critical of some of US of CC's activities. On November 22, 2010, employee O.V. sent an email response to the Staff for an Open Shop newsletter to several employees at the College, but specifically addressed his remarks to employee J.F. (an employee who had previously sent communications on behalf of Staff for an Open Shop, but who denied circulating the newsletter in question). (GC Exh. 72(c); R. Exhs. 29–30; see also GC Exh. 105 (Nov. 25, 2010 email sent by employee J.F. on behalf of Staff for an Open Shop).) Employee O.V.'s email stated:

> Dear [employee J.F.]:
>
> It must be a nice luxury to sit on the sidelines and criticize everything that is done. US of CC, and myself personally, worked very hard to get the employees in the Science Institute department their 90 day notice. It means a lot to these employees to get 90 more days of pay, along with the chance to spend 12 paid days looking for another position. The part time staff were very stressed out to find out that their job was eliminated, but the 90 day notice benefit that the US of CC has negotiated for all the bargaining unit members, brought them a lot of relief, because this gave them the opportunity to focus on a plan on how they are going to make a living after their notice comes to an end. This by far is a great benefit since staff not part of the bargaining unit list have been let go by the College without any notice in advance.
>
> In your desire to be negative about everything that the [US of CC] has done, including getting the administration to improve their pay offer from nothing, you are doing a disservice to many dedicated Columbia employees who love their jobs but don't want management to have the only say in how this College treats its employees.
>
> [Employee O.V.]

(GC Exh. 72(c).)

Upon receiving employee O.V.'s email, employee J.F. contacted Vice President for Human Resources Ellen Krutz to seek Respondent's assistance in addressing employee O.V.'s email, which J.F. characterized as "personal defamation" and the "public 'singling out' of an individual staff member."[28] (Tr. 671, 699; R. Exhs. 29–30.) Krutz agreed to investigate the matter, and determined that employee O.V. violated Respondent's Network and Computer Use policy when he sent the email to employee J.F. Krutz reached her conclusion in part because she determined that employee J.F. felt intimidated by the email and reasonably feared that the US of CC would retaliate against her in some fashion. (Tr. 709–710, 713.) Accordingly, Krutz met with employee O.V. and orally reprimanded him for violating the Network and Computer Use Policy. (Tr. 710–711, 722; GC Exh. 73, p. 2.) Union Representative Bill Silver (who works with both PFAC and the US of CC) was aware that Krutz questioned employee O.V. about the email that he sent to J.F., and was aware that Krutz admonished O.V. for sending the email. (Tr. 420 (stating that Silver was aware that the College "admonished" O.V., but was not aware that the College "orally reprimanded" O.V.) (a form a discipline, in Silver's view).)

[28] Through Steven Kapelke, its provost and senior vice president at the time, Respondent advised the US of CC (including Bill Silver, who also works with PFAC as a union representative) that it also believed that employee O.V.'s email "did not meet the College's policies and procedures," and that the email should not have singled out employee J.F. as the person responsible for the Staff for an Open Shop newsletter. (Tr. 415–416; GC Exh. 72(d).)

c. December 2011—PFAC members disagree via email about Vallera's leadership

Over 1 year later, on December 8, 2011, employee J.M. circulated an email to College faculty and staff to voice his frustrations about PFAC's leadership. Employee J.M. explained that he was a PFAC member and was "definitely pro-union," but asserted that PFAC's leadership did not have its members' interests at heart. Specifically, employee J.M. asserted:

> In my opinion, and it is wholly MY opinion, the adversarial rhetoric and accusations that our leadership has been hurling at the administration over the last two years have been counterproductive, and often, just plain incorrect! This "Us against them" atmosphere has created unnecessary and unwarranted tension and animosity between colleagues and within departments as a whole. These tactics are a waste of time. I can't see that they serve any purpose other than to drag out the contract negotiations. . . .
>
> I think the blame for this nonsense has to be placed squarely at the feet of our current president, Diana Vallera. I believe that she misrepresents the administration and distorts/edits the numbers and other facts to make things sound abusive (e.g., "new hire" numbers.) It's my impression with regards to negotiations is that Diana is disruptive and uncooperative. Why is our union president pursuing such a course of action, and not trying to bring some constructive end to contract negotiations? I don't know, but it looks to me like we need new leadership.
>
> One last thing: you'll notice that I haven't included any "proof" to support my opinions and impressions. That's because I don't want you to take my word for it. I want each of you to take a good hard look at what's going on. I don't think you'll have to look too deep to see the same things that I do. Thanks for your time and your ear.
>
> Sincerely, [Employee J.M.]

(GC Exh. 71.) Employee J.M.'s email prompted other PFAC members to send responsive emails, with some PFAC members agreeing with J.M.'s concerns about PFAC's leadership (see, e.g., R. Exhs. 27–28; Tr. 684) and other PFAC members expressing support for Vallera and her efforts as PFAC's president (see, e.g., R. Exh. 79). One of the College's department coordinators (a supervisor within the meaning of the Act) forwarded employee J.M.'s email to other college personnel, and J.M.'s email was also published in the December 12 issue of the Columbia Chronicle, a student-run newspaper at the College. (Tr. 174, 316, 327–328; GC Exh. 71(a).)

d. The College decides not to take action against PFAC members who criticized Vallera

On December 12, 2011, Bill Silver sent a letter to interim provost Louise Love to assert that employee J.M. misused Respondent's email system when J.M. sent the email criticizing PFAC/Vallera, and to request that Respondent "take immediate action to prevent any further misuse of the College's email system for personal attacks and harassment against a fellow campus employee." Silver reminded Love that approximately 1 year earlier, Respondent admonished employee O.V. for the remarks that he made in the November 22, 2010 email to employee J.F. about the US of CC, and asserted that employee J.M.'s email about PFAC's leadership also violated Respondent's Network and Computer Use Policy. (GC Exh. 73, pp. 3–5; see also Tr. 441–442.)

Similarly, on December 14, 2011, PFAC's steering committee wrote to Love and Krutz to request that Respondent investigate whether employee J.M.'s email violated Respondent's Network and Computer Use Policy and/or Respondent's antiharassment policy. The PFAC steering committee also asserted that by not enforcing its policies, Respondent permitted other employees to compound the problem by re-sending employee J.M.'s email to others at the College. (GC Exh. 73, pp. 6–7; see also Tr. 175, 395, 679–680; GC Exh. 72(b) (Respondent's AntiDiscrimination and Harassment policy).)

On December 21, 2011, Krutz responded to the letters from Silver and the PFAC steering committee. (Tr. 680–681.) Krutz explained that in Respondent's view, it did not need to discipline employee J.M. or take any other action regarding J.M.'s December 8, 2011 email because "no reasonable person would find that [employee J.M.'s] email intimidated, harassed and/or created a hostile work environment with regard to Union President Diana Vallera." (GC Exh. 73, p. 1.) In particular, Krutz asserted that employee J.M. did not violate Respondent's policies by exercising his Section 7 right to question the wisdom of PFAC's leadership, nor did he attempt to threaten or intimidate Vallera (in contrast to Krutz' interpretation of employee O.V.'s November 2010 email to employee J.F.). (Id., p. 2; see also Tr. 682–683.) Vallera and Silver contested Krutz' analysis in an email to Krutz dated January 2, 2012, but Krutz responded on January 5 that she would stand by her earlier decision. (GC Exh. 73, pp. 1, 3.)

3. Discussion and analysis

As its initial salvo regarding the allegations in this section, the College contends that the complaint allegations concerning the Network and Computer Use Policy must be dismissed because they are not closely related to the underlying charge that PFAC filed with the Board in Case 13–CA–076794. (R. Posttrial Br. at 73–75.) To decide whether complaint allegations are closely related to the allegations in a timely filed charge, the Board evaluates whether the complaint allegations are factually and legally related to the charge. *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1988).

In the charge for Case 13–CA–076794, PFAC alleged that "[s]ince in or about October 2011, the [College has violated the Act] . . . by encouraging Union members to attack and undermine the current leadership of PFAC . . . , disparately enforcing its email policy by allowing employees to disparage Vallera and by permitting agents of the College to disseminate the disparaging statements to other employees thereby placing management's imprimatur on these statements." (GC Exh. 1(m).) The complaint allegations regarding the College's Network and Computer Use Policy are closely related to the allegations in the underlying charge, because: (a) both the charge and paragraph V(b) of the complaint assert that the College enforced its policy in a disparate manner; and (b) the allegation that the policy itself is unlawful (par. V(a) of the complaint) is factually

and legally related to the charge insofar as the same Network and Computer Use Policy is at issue, and the legal question of whether a work rule is unlawful on its face is commonly linked to the question of whether an employer has applied or enforced a work rule in an unlawful manner. (See sec. a, infra (discussing the legal standard that applies to allegations that a work rule violates Sec. 8(a)(1) of the Act).) I therefore find that the complaint allegations about the College's Network and Computer Use Policy are procedurally valid, and I accordingly turn to the merits of those allegations.

a. Did the College violate Section 8(a)(1) of the Act by maintaining its Network and Computer Use Policy?

The Board has articulated the following standard that specifically applies when it is alleged that an employer's work rule violates Section 8(a)(1):

> If the rule explicitly restricts Section 7 activity, it is unlawful. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In applying these principles, the Board refrains from reading particular phrases in isolation, and it does not presume improper interference with employee rights.

NLS Group, 352 NLRB 744, 745 (2008) (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004)), adopted in 355 NLRB 1154 (2010), enfd. 645 F.3d 475 (1st Cir. 2011). As with all alleged 8(a)(1) violations, the judge's task is to "determine how a reasonable employee would interpret the action or statement of her employer . . . , and such a determination appropriately takes account of the surrounding circumstances." *The Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011).

In this case, the Acting General Counsel does not claim that the Network and Computer Use Policy explicitly restricts Section 7 activity. Instead, the Acting General Counsel asserts that the policy is overbroad, and thus includes language that employees could reasonably construe as prohibiting Section 7 activity. Specifically, the Acting General Counsel takes issue with the policy language that prohibits individuals from using the College's information technology system "in ways that interfere with or demean others," because in the Acting General Counsel's view, that policy language could be interpreted as including protected Section 7 activity. (GC Posttrial Br. at 48.)

The Board has issued two decisions that are instructive on the merits of the Acting General Counsel's challenge to the College's policy. In *Claremont Resort & Spa*, the Board was presented with a work rule that prohibited "negative conversations" about employees or managers and warned employees that such conversations were in violation of the employer's standards of conduct and could result in disciplinary action. 344 NLRB 832, 832, 836 (2005). Applying the test set forth in *Lutheran Heritage Village-Livonia*, supra, the Board found that the rule was unlawful because its "prohibition of 'negative conversations' about managers would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities." *Claremont Resort & Spa*, 344 NLRB at 832; see also *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989) (finding that a rule that prohibited "derogatory attacks" was unlawful because it could reasonably be construed as prohibiting permissible union propaganda that placed the employer in a negative light), enfd. in pertinent part 916 F.2d 932 (4th Cir. 1990).

In *Hyundai America Shipping Agency*, the Board was presented with a number of work rules that the Acting General Counsel challenged as unlawful. 357 NLRB 860, 860 (2011). The Board agreed that the employer violated Section 8(a)(1) of the Act by maintaining work rules that threatened employees with discipline if they disclosed information from their personnel files, or if they complained to their coworkers instead of voicing complaints directly to their supervisor or the human resources office. Id. However, the Board also held that it was lawful for the employer to threaten employees with discipline for "indulging in harmful gossip." Id., slip op. at 2. As the Board explained, employees could not reasonably construe the harmful gossip rule as prohibiting Section 7 activity because the rule was only directed at gossip, which was commonly defined as chatty talk or rumors or reports of an intimate nature. Id. (distinguishing the work rule at issue in *Claremont,* which referred to any negative conversations about employees or managers, and thus implicitly extended to protected activity).

After considering the relevant legal authorities and the surrounding circumstances that relate to the Network and Computer Use Policy, I agree with the Acting General Counsel that the policy is unlawfully overbroad. *Merriam-Webster's Collegiate Dictionary* (11th edition) defines the term "demean" as "to lower in character, status or reputation." Given that broad definition, an employee could reasonably construe the College's prohibition of communications that demean others as including protected statements that fall short of being malicious, but nonetheless lower the character, status or reputation of the College because the statements place the College in a negative light. See *Southern Maryland Hospital*, 293 NLRB at 1222 (applying this reasoning to a work rule that prohibited derogatory attacks); see also *Central Security Services*, 315 NLRB 239, 243 (1994) (explaining that false and inaccurate employee statements are protected under the Act unless they are knowingly false or otherwise are malicious). The surrounding circumstances support my assessment, because the evidentiary record shows that both the College and PFAC invoked the Network and Computer Use Policy to challenge a permissible union (or antiunion) activity. (See FOF, secs. b and d, supra (policy used to challenge remarks made by O.V. and J.M.).) Accordingly, I find that the College violated Section 8(a)(1) of the Act by maintaining its overbroad Network and Computer Use Policy.

b. Did the College violate Section 8(a)(1) of the Act by selectively applying its Network and Computer Use Policy only against employees who support unions?

The Acting General Counsel also maintains that the College disparately applied its Network and Computer Use Policy by permitting employees to send antiunion emails in December

2011, but reprimanding employee O.V. for sending a prounion email in November 2010. The Acting General Counsel contends that by applying its policies in this disparate manner, the College violated Section 8(a)(1) of the Act by engaging in conduct that has a reasonable tendency to interfere with, restrain, or coerce union or protected activities. *KenMor Electric Co.*, 355 NLRB 1024, 1027 (2010) (noting that the employer's subjective motive for its action is irrelevant); *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000) (same); see also *Park N' Fly, Inc.*, 349 NLRB 132, 140 (2007).

While I understand the Acting General Counsel's theory, I find that it fails because it runs afoul of Section 10(b) of the Act. Simply put, the Acting General Counsel does not really take issue with the College's decision not to intervene when PFAC members began exchanging emails about Vallera's leadership in December 2011. (See R. Exh. 90, p. 2 (letter from the Acting General Counsel to PFAC, taking the position that employee J.M.'s email about Vallera did not violate the Act).) Instead, the Acting General Counsel takes issue with the fact that the College reprimanded employee O.V. for arguably similar (but prounion) conduct in November 2010.

Section 10(b) bars the Acting General Counsel from alleging in the complaint in this case that the College violated the Act when it reprimanded employee O.V, and it also bars the Acting General Counsel from litigating that issue indirectly by arguing, in effect, that the College's reprimand of employee O.V. continues to cast a chill on employees who engage in protected activities.[29] See NLRA, Section 10(b) (explaining that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board"). Accordingly, I recommend that the allegation in paragraph V(b) of the complaint be dismissed as untimely.

In the alternative, I recommend that the allegation in paragraph V(b) of the complaint be dismissed on the merits. The evidentiary record shows that once PFAC members began debating Vallera's leadership in December 2011, the College allowed employees to circulate both pro and anti-Vallera emails. (See FOF, sec. b.) Thus, at the time of the incident, the College enforced its Network and Computer Use Policy in a neutral manner. To the extent that the College may have enforced the policy differently in November 2010, I find that in light of the facts presented in this case, the November 2010 incident was too remote from the events of December 2011 to have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

[29] I emphasize that my finding here does not implicate the ability of parties to present disparate treatment evidence to prove discrimination. In a discrimination case, a party may use older incidents to prove that the employer handled a recent (i.e., timely filed under 10(b)) event unlawfully.

The Acting General Counsel does not present such a theory here. Instead, the Acting General Counsel generally agrees that the College properly handled the December 2011 emails about Vallera's leadership (which were timely presented in a charge filed with the Board), but then asserts that the College nonetheless violated the Act based on how it handled employee O.V.'s email communications in November 2010 (an issue that is barred by 10(b)).

E. Information Request about Respondent's Early Feedback System

1. Complaint allegations

The complaint alleges that since on or about February 17, 2012, Respondent has failed and refused to provide PFAC with information that PFAC requested on December 20, 2011, concerning Respondent's unilateral implementation of its Early Feedback System. (GC Exh. 1(ff), pars. VIII(a), (e) (alleging violation of Sec. 8(a)(5) and (1)).)

2. Findings of fact

a. The Early Feedback System—overview

In fall 2011, the College implemented a pilot "Instructor Early Feedback System" to monitor the performance of instructors in the College's First Year Seminar classes. (Tr. 943–945; GC Exh. 45.) The Early Feedback System consists of five steps (paraphrased from the original):

1. Survey—in the fifth week of the semester, all First Year Seminar students are asked to complete a survey about their classroom experience. In the survey, students are asked to indicate whether they "strongly agree," "agree," "disagree" or "strongly disagree" with the following statements:
    a. My instructor effectively encourages all students to participate in class activities and discussions.
    b. My instructor's assignments and directions are clear.
    c. My instructor treats students fairly and respectfully.
    d. My work is graded in a way that is clear and makes sense.
    e. So far, the kind of work that we have been asked to do is worthwhile.
    f. My instructor is available to talk outside of class.
    g. Overall, my instructor is an effective teacher.

    The survey also asked students to state what "has most shaped your perception of the course and instructor," and to provide any constructive feedback they would like to share.
2. Analysis—First Year Seminar staff will review student survey results and use them to help identify classes where student satisfaction seems low or there are other "red flags."
3. Discussion and Classroom visits—First Year Seminar staff members will contact any instructors "whose survey results indicate a high level of dissatisfaction or other potential problem" to discuss the survey results and their possible implications or genesis. Staff members may also observe the class to determine whether some form of mentoring is needed.
4. Mentoring—Instructors who could benefit from a greater level of guidance and support will, in concert with

First Year Seminar staff, devise a mentoring plan that will be carried out during the remainder of the semester (e.g., face to face meetings, more classroom visits or observations, or a review of instructional materials and class plans). The mentoring plan will also state a means of determining whether the mentoring was successful.

5. Follow-up and further steps—First Year Seminar staff will determine the progress of the mentoring plan. In most cases, the mentoring plan will produce a positive impact on the instructor's classroom performance and the students' classroom experience. If the mentoring plan does not produce positive results, however, "an official College Part-Time Faculty Evaluation Report may be completed, indicating that the instructor has not met expectations. . . . In most cases, [First Year Seminar] will not offer future teaching assignments to such instructors."[30]

(GC Exh. 45.)

b. PFAC requests information about the Early Feedback System

On October 19, 2011, PFAC President Diana Vallera received an email from a PFAC member who was notified by First Year Seminar staff that the 5-week student surveys (from step one of the Early Feedback System) raised some concerns. (Tr. 114–115; GC Exh. 42.)

After obtaining a written description of the Early Feedback System, on December 20, 2011, Vallera wrote a letter to interim provost Louise Love about the program. In her letter, Vallera asked Respondent "to immediately cease and desist in the implementation of this evaluation program, and to rescind any and all actions taken under this evaluation program," because Respondent implemented the Early Feedback System unilaterally and without any discussion with PFAC. (Tr. 115, 955–956; GC Exh. 46.)

Vallera also asked Love to provide PFAC with the following information about the Early Feedback System:

1. The names of any instructors who have been notified that there is dissatisfaction with his/her work performance.
2. Any subsequent action(s)—disciplinary, remediation or otherwise—that has been taken with those instructors identified in the above item # one.
3. A copy of all student surveys that have been compiled, with the names of the students redacted.
4. Any other department affected by this new evaluation system.
5. The names of any members that were evaluated under this new Procedure.

(GC Exh. 46.) On January 20, 2012, Love acknowledged receiving Vallera's December 20, 2011 email, and advised that Respondent was in the process of preparing a reply. (GC Exh. 47.)

c. The College responds to PFAC's information request about the Early Feedback System

On January 30, 2012, PFAC filed an unfair labor practice charge to assert that the College failed to comply with Vallera's/PFAC's information request regarding the Early Feedback System. (GC Exh. 1(a); see also GC Exh. 1(e) (amended charge filed on February 10, 2012).)

On February 17, 2012, Susan Marcus, associate vice president for Academic Affairs, responded to Vallera's December 20, 2011 email to Love, since she (Marcus) was the College's liaison with PFAC. (Tr. 941; R. Exh. 43.) Marcus asserted that the Early Feedback System was consistent with the terms of the existing collective-bargaining agreement, including the management-rights clause and the College's evaluation policy (which Marcus maintained was established in accordance with the collective-bargaining agreement). Therefore, Marcus advised Vallera that the College would continue to use the Early Feedback System, and would not rescind any actions taken under that program. (R. Exh. 43.)

Regarding PFAC's request for information about the Early Feedback System, Marcus did not provide any information in response to PFAC's first two requests (for the names of instructors who had been notified that there was dissatisfaction with their work performance, and any actions taken regarding those instructors) because she determined that those requests were "overbroad, unlimited in scope, vague, and ambiguous."[31] (R. Exh. 43, p. 2; Tr. 120.) Marcus admitted during trial, however, that she had not seen or reviewed Respondent's written description of the Early Feedback System when she prepared her letter in response to PFAC's information request (she instead relied on a verbal description of the program that another employee provided). (Tr. 964–967.) Marcus did provide the student surveys that PFAC requested (request #3), and also provided brief responses to PFAC requests 4 and 5. (R. Exh. 43, p. 2 (indicating that the First Year Seminar program implemented the Early Feedback System independent of other departments, and stating that PFAC should refer to the student surveys provided in response to request #3 for the names of the faculty

[30] Instructors who have taught at least 51 credit hours and have not met expectations for First Year Seminar teaching will be offered an opportunity to remediate those deficiencies. Instructors may or may not be offered a First Year Seminar section during the remediation semester. (GC Exh. 45.)

[31] Marcus testified that she believed items 1 and 2 of PFAC's information request were ambiguous because: the collective-bargaining agreement does not have any provisions regarding notifying faculty about dissatisfaction; it was not clear what PFAC meant by notification of dissatisfaction, since such notification could range from a comment made in casual conversation to a more formal type of notification; and because PFAC did not specify a time frame for its request. (Tr. 946–949.)

I do not credit Marcus' explanation because Vallera's letter specifically referred to the Early Feedback System, and Marcus demonstrated that she understood that fact when she provided PFAC with the student surveys that the First Year Seminar program compiled under the Early Feedback System (information request item 3). (R. Exh. 43; see also Tr. 957.) Moreover, the College's own description of the Early Feedback System discusses contacting instructors if their student survey results indicate a high level of dissatisfaction. (GC Exh. 45; Tr. 958–959.) To the extent that Marcus did not understand that terminology (see Tr. 964–967), that misunderstanding is chargeable to the College.

members who were evaluated under the program).) PFAC and the College did not correspond further about the College's responses to the information request. (Tr. 950.)

3. Discussion and analysis

An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration. Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. By contrast, information concerning extra-unit employees is not presumptively relevant, and thus relevance must be shown. *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011). The burden to show relevance is not exceptionally heavy, as the Board uses a broad, discovery-type standard in determining relevance in information requests. Id.

The information that PFAC requested about the Early Feedback System is presumptively relevant because it relates to the terms and conditions of employment of PFAC members. Through Marcus, the College admitted that it did not provide any information to PFAC in response to its requests for the names of instructors who had been notified that there was dissatisfaction with their work performance, and any actions taken regarding those instructors, because Marcus determined that those requests were "overbroad, unlimited in scope, vague, and ambiguous."

Marcus' explanation does not establish a defense. As the Board has explained, "[i]t is well established that an employer may not simply refuse to comply with an ambiguous or overbroad information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information." *National Steel Corp.*, 335 NLRB 747, 748 (2001) (quoting *Keauhou Beach Hotel*, 298 NLRB 702 (1990)), enfd. 324 F.2d 928 (7th Cir. 2003). The College ran afoul of those legal principles when it decided not to provide information in response to items 1 and 2 of PFAC's information request without attempting to clarify, or comply with, those requests.[32]

Since the College did not fulfill its obligations under the Act in responding to PFAC's request for information about the Early Feedback System, I find that the College violated Section 8(a)(5) and (1) of the Act as alleged in paragraphs VIII(a) and (e) of the complaint.

[32] The Board's decision in *AT&T Corp.*, 337 NLRB 689 (2002) (a case cited by the College—(see R. Posttrial Br. at 69–70) is not applicable here because it did not involve a refusal to provide information (as here) because the employer believed the request was overbroad and ambiguous. Instead, the employer in *AT&T Corp.* responded to all of the union's information requests, and the question of whether the employer violated Sec. 8(a)(5) turned on the factual question of whether the employer reasonably believed that its information request responses were complete. 337 NLRB at 691. The College cannot make a similar claim here since, as previously noted, it did not respond to two of PFAC's requests because it deemed them to be overbroad and ambiguous.

F. Class Assignments to Vallera for Summer and Fall 2012

1. Complaint allegations

The complaint alleges that since March 2012, the College failed to refused to assign summer 2012 semester classes to Diana Vallera because she engaged in union and protected concerted activities, and because she testified in Case 30–CA–018888, and cooperated in the investigation (including providing affidavits to the Board) in Cases 13–CA–073486, 13–CA–076794, 13–CA–078080, and 13–CA–081162. (GC Exh. 1(ff), pars. VI(e)–(f) (alleging violations of Sec. 8(a)(3), (4), and (1) of the Act).)

The complaint also alleges that since March 2012, the College failed and refused to assign more than one class section to Diana Vallera for the fall 2012 semester because she engaged in union and protected concerted activities, and because she testified in Case 30–CA–018888, and cooperated in the investigation (including providing affidavits to the Board) in Cases 13–CA–073486, 13–CA–076794, 13–CA–078080, and 13–CA–081162. (GC Exh. 1(ff), pars. VI(e)–(f) (alleging violations of Sec. 8(a)(3), (4), and (1) of the Act).)

And, the complaint alleges that since on or about May 13, 2012, the College has failed and refused to provide PFAC with information that PFAC requested concerning the College's assignments of classes to part-time faculty in the photography department for fall 2012. (GC Exh. 1(ff), pars. VIII(b), (f) (alleging violation of Sec. 8(a)(5) and (1)).)

2. Findings of fact

a. Faculty class assignment process—overview

For every semester, the College has to determine what courses it will offer, how many class sections it will offer for each course, and which faculty members it will assign to teach the various class sections.[33] The number of class sections that is needed for a particular course generally depends on student demand for the course. Student demand for courses can be affected by a host of factors, including: whether student enrollment is increasing or decreasing in a particular department or in the College as a whole; whether the course is required for a particular major, or is an elective; and whether the course has prerequisites or is a prerequisite for other courses. (Tr. 457, 591–592, 610–611, 814–815.)

As part of the process of assigning faculty to teach classes, several months before each academic year each department at the College asks its faculty members to submit forms setting forth their availability to teach and their desired course assignments. (Tr. 259.) The departments then make faculty teaching assignments, keeping in mind that full-time faculty members have priority over part-time faculty members, and that in some limited circumstances, part-time faculty members who have taught at least 51 credit hours at the College have assignment priority (and bumping rights) over less experienced part-time

[33] A single course can have several class sections, depending on the number of students who wish to complete the course. (Tr. 476.) For example, in the fall 2010 semester, the View Camera course had four class sections. (R. Exh. 82.)

faculty members.[34] (Tr. 456, 524; R. Exh. 1, art. VII(1) (explaining that bumping rights arise when, due to low enrollment or the need to assign classes to a full-time faculty member, an experienced part-time faculty member loses a class section that they were assigned); see also R. Exh. 1, art. VII(2) (for purposes of "instructional continuity," the College generally will explore finding alternate classes for part-time faculty members if the class they were slated to teach is canceled).)

The College notifies part-time faculty members of their class assignments by sending them an adjunct faculty teaching assignment form. (See, e.g., GC Exhs. 97–99.) When faculty assignments have been completed, the College posts all course and class offerings on its online catalog (OASIS) for students to review and begin course registration. (Tr. 259–260.)

b. Diana Vallera's teaching assignment history

Between 2006 and 2011, Vallera generally taught two classes each spring and fall semester: View Camera I; and either Studio I (a/k/a Introduction to Lighting) or Studio II (a/k/a Advanced Lighting). In addition, between 2008 and 2011, Vallera taught View Camera I during each summer semester.[35] (GC Exh. 90(b); see also Tr. 270, 1219–1220.) It is undisputed that Vallera consistently received outstanding evaluations from students who took her classes. Among other awards and accolades, Vallera was selected to teach in Italy for the summer of 2007, and was nominated at least twice for the College's excellence in teaching award (finishing as runner up for that award in 2010). (Tr. 245, 250–251, 271–273, 300, 1248; GC Exhs. 103, 104.)

c. December 2011 faculty meetings about the faculty class assignment process

On December 7–8, 2011, the photography department held meetings to advise faculty about the faculty class assignment process. First, department managers explained that they would be following a "leaner" scheduling model than in previous years. In previous years, the department used a comprehensive scheduling model, under which it would announce a full list of classes, and then eliminate certain classes if student enrollment fell short. For the next and future school years, however, the department would announce a limited (leaner) list of classes, and then add classes only if warranted by high student enrollment or other factors.[36] (Tr. 835–836.) As the department explained, a "lean schedule is set to [e]nsure that courses will fill and that faculty are able to teach the courses they are offered to teach." (R. Exh. 35, p. 3.)

Second, department managers presented data showing that enrollment in the photography department had declined to 689 students (down from 776 in fall 2009). (R. Exh. 35, p. 9.) And third, department managers advised faculty of changes in the photography department curriculum due to revisions that the department made to its B.A. degree requirements. Among other changes, View Camera I would no longer be a required course for the B.A. degree. (R. Exh. 35, p. 13 (also noting that three other courses were no longer required for the B.A. degree).)

d. Vallera's union activities in 2012

In early 2012, Vallera remained active in her role as PFAC president. For example, on February 6–8, Vallera testified as a witness for the Acting General Counsel/PFAC and also sat at counsels' table during the trial that the Acting General Counsel, the College, and PFAC litigated in Case 30–CA–018888. (Tr. 189; GC Exh. 7.) PFAC also filed charges with the Board in Cases 13–CA–073486, 13–CA–076794, 13–CA–078080, and 13–CA–081162 that related to Vallera's activities as PFAC's president. (GC Exhs. 1(a), (e), (g), (i), (m), and (s) (original and amended charges filed between January 30 and May 16, 2012).)

In addition, on March 12, the Columbia Chronicle ran an article about the ongoing difficulties that PFAC and the College were having with bargaining for a new collective-bargaining agreement. In that article, Vallera asserted that PFAC was going to file another unfair labor practice charge against the College because it had not provided PFAC with dates to meet for further negotiations. (GC Exh. 27.)

e. Photography department announces new "foundations" courses

On February 8, the photography department held a faculty meeting to discuss its new "foundations" courses that would replace four courses (Photo I & II, and Darkroom I & II), and would require some modifications to other courses (including Digital I and Introduction to Lighting). (R. Exh. 34; see also R. Exh. 94.) The department notified faculty that it would offer training in the new foundations courses beginning in May and June 2012, and would start phasing in the foundations courses in fall 2012. (R. Exh. 34.)

f. March 2012—Vallera notifies the College of her availability to teach during the 2012–2013 school year

On February 10, 2012, the photography department distributed class availability forms to its faculty for the fall 2012 and spring 2013 semesters. (GC Exh. 91(a); R. Exh. 38.) Vallera returned her form, and indicated that she would be interested in teaching the following courses (listed in order of preference): Introduction to Lighting (two classes); View Camera; Photo Seminar; Documentary; and Advanced Lighting. Vallera also expressed interest in taking the training for, and teaching, the new foundations courses, but noted that she might need to amend her form after she received information from Photography Department Chair Peter Fitzpatrick about course and

[34] Part-time faculty members are limited to teaching 9 credit hours per semester, and a total of 18 credit hours for the fall and spring semesters. The College may grant special permission to exceed those limits. (Tr. 263–264.)

[35] The faculty assignment process for summer semester classes was more informal than the assignment process for fall and spring semesters. In Vallera's case, instead of filling out an availability form, she was approached by Elizabeth Ernst in 2008 to see if she was interested in teaching a summer class, agreed to do so, and generally was "rolled over" to teach in subsequent summers. (Tr. 274–275; see also GC Exh. 90(b).)

[36] Eliza Nichols, dean of the school of fine and performing arts, issued the directive for departments to begin using leaner scheduling. (Tr. 836; see also R. Exh. 20 (February 2010 email from Nichols to department chairs that encouraged them to take steps to, among other things, avoid opening up classes that would have to be canceled later).)

curriculum changes in the department that were announced in the February 8 faculty meeting.[37] (GC Exh. 91(a); see also R. Exh. 93.)

On February 17, 2012, Vallera contacted Associate Photography Department Chair Kelli Connell to discuss her teaching availability for the 2012-2013 academic year. (R. Exh. 95.) Connell first confirmed with Fitzpatrick and Susan Marcus[38] that it would be appropriate for her to meet with Vallera. (Tr. 864; R. Exh. 95.) In the ensuing communications between Connell and Vallera about Vallera's schedule and availability, Vallera asked if she would still have a View Camera class for the summer. Connell responded on February 27, 2012, by advising Vallera that the College would not be offering View Camera during the summer 2012 semester. (R. Exh. 96.)

g. Vallera expresses concern to the College about summer and fall 2012 faculty class assignments

On March 19, 2012, Vallera observed that students had commenced online registration for the fall 2012 semester, but did not see any part-time faculty members listed as teaching classes. Vallera also observed that a full-time faculty member was teaching the only View Camera class offered. Vallera emailed Connell to ask about discussing alternative classes that she could teach in fall 2012, and also to ask about "the loss of [her] summer class," why View Camera was not offered in summer 2012, and why she was not offered any other classes for that semester. Finally, Vallera advised Connell that they needed to meet to discuss curriculum changes in the photography department, any class limits, and any changes in past practices for how faculty class assignments are handled. (Tr. 194, 284–285; GC Exh. 91(b); see also GC Exh. 90(c) (indicating that the photography department offered 15 classes and 1 internship in summer 2012, and that View Camera dropped from 5 classes in summer 2010 (and before), to 1 class section in summer 2011, and no classes in summer 2012).)[39]

Vallera emailed Connell (along with Fitzpatrick) again on March 22 to followup on her March 19 email, and to state PFAC's view that working conditions at the College should remain at the status quo while the College and PFAC bargained for a successor collective-bargaining agreement. Vallera asserted that the changes taking place in the photography department impacted the working conditions of part-time faculty members, and demanded that the College bargain with PFAC about its decisions regarding the photography department, and the impact and effects of those decisions. (GC Exh. 91(b), p. 7.)

h. The College responds to Vallera's questions about faculty class assignments

Connell responded to Vallera's emails on March 23 by inviting Vallera to add another course to her availability form instead of View Camera. Vallera agreed to do so, and sent Connell a list of the following 14 types of classes that she would be willing to teach: Introduction to Lighting; View Camera; Photography Seminar; Advanced Lighting; Foundations of Photography I; Documentary; Portfolio Development; Advanced Color; 19th Century or Experimental; digital classes; other studio classes; Photography in Chicago; Advanced View Camera; and darkroom classes. (GC Exh. 91(b), pp. 3–5.)

On March 23, 2012, Susan Marcus also responded to Vallera's March 19 email to Connell.[40] Regarding class assignments for fall 2012, Marcus agreed that Vallera should contact Connell about the classes that Vallera believed she was qualified to teach for that semester. However, regarding Vallera's concern about losing her summer class, Marcus responded:

> Please clarify your rationale that there was a 'loss of my' summer class in relation to the decisions in the [employee R.P.] arbitration and case # (13–CA–045973).[41]

Similarly, regarding Vallera's request that the College bargain with PFAC about its decisions to make changes in the photography department and the effects of those decisions, Marcus stated:

> With respect to your request for a meeting about the above topics, please also see the decisions in the [employee R.P.] arbitration and case # (13–CA–045973).[42] Additionally, as you

[37] Vallera was not able to attend the February 8 faculty meeting, and could not obtain a copy of the PowerPoint presentation that was used at the meeting. In response to Vallera's request for information about the photography department curriculum changes that were announced at the meeting, on February 17, Fitzpatrick emailed a memorandum to photography department faculty about the new foundations courses that would be offered in the department. (R. Exhs. 93–94.)

[38] Since Fitzpatrick was relatively new to the College, and it was at times unclear whether Vallera sent her email correspondence in her personal capacity or in her capacity as PFAC president, Marcus wished to monitor his communications with Vallera. Vallera was the only faculty member in the photography department that Marcus monitored in this fashion. (Tr. 862, 872–873, 885–886, 910, 932–934.)

[39] There is no evidence that Vallera was in a position to bump any of the faculty members assigned to summer 2012 classes from their assignments. (R. Exh. 1, art. VII (outlining the parameters for "bumping" or class reassignment); R. Exh. 46, p. 2 (indicating that 13 of 15 the part-time faculty members assigned to summer classes could not be bumped because they had accrued 21 or more credit hours; no data is available for the remaining 2 part-time faculty members); GC Exh. 90(c) (indicating that one faculty member was assigned to 1 class and 1 internship).)

[40] It was highly unusual for an administrator at Marcus' level to get involved with questions about class assignments to individual faculty members, unless such an issue arose as part of a formal grievance. Normally, a faculty member would be expected to raise class assignment issues with their immediate supervisor. (Tr. 485–487, 911–912.)

[41] As previously noted, the arbitrator in employee R.P.'s grievance ruled that R.P., as a part-time faculty member, was only employed during the semesters that R.P. was hired to teach, and had no standing to question decisions about future employment. (See sec. B(2)(e), supra (discussing GC Exh. 54).) In Case 13–CA–045973 (a charge asserting that the College made unlawful changes to Vallera's class schedule), the Acting General Counsel denied PFAC's appeal from the Regional Director's refusal to issue a complaint, explaining that "the evidence indicated no contractual right of part-time faculty to any particular course or schedule." (R. Exh. 7.)

[42] Marcus admitted that she should have forwarded Vallera's request for bargaining to Leonard Strazewski, since he was handling all bargaining with PFAC. (Tr. 980–982.) Marcus' expertise is with handling grievances that allege that the College violated the existing collective-bargaining agreement. (Tr. 980.)

> have been informed repeatedly, these questions should not be asked of the Associate Chair [Connell]. If you persist in ignoring appropriate channels, your requests will not be forwarded to the appropriate office.

(GC Exh. 92; see also Tr. 926–928, 935.)

Marcus' intervention prompted a swift response from Vallera. Indeed, later on March 23, Vallera emailed Marcus and asserted:

> As you have been repeatedly warned in the past, PFAC will not tolerate any intimidation tactics on the part of this administration. Your tactics [] of avoiding to answer questions, intimidating, and not allowing chairs of departments to meet with PFAC to resolve issues will not be tolerated. PFAC absolutely has a right to request a demand to bargain over the terms [and] conditions of employment and what you seem to be avoiding is the very important issue of remaining status quo while in bargaining.

(GC Exh. 92.) Vallera went on to contend that the College changed the status quo by not including part-time faculty in the online course catalog, and asked Marcus to explain whether the photography department chair made that change on his own, or instead pursuant to a directive from someone else at the College. (Id.)

i. March 28, 2012—studio program coordinator weighs in on Vallera's request for an additional class to teach in the fall 2012 semester

On March 28, 2012, Elizabeth Ernst, coordinator of the studio program in the photography department, offered her input to Fitzpatrick about whether Vallera should be assigned a second class to teach for the fall 2012 semester.[43] (Tr. 886–887, 912; GC Exh. 106.) Ernst offered the following comments:

> Peter,
>
> Are the natives restless yet? I am not sure if the schedule has gone live yet but wanted to let you know my thoughts about a second class for Diana [Vallera]. She will request a section of Advanced Lighting, which she has taught ONCE a few years ago. [Employee T.] graciously tutored her for teaching this class. She is not qualified to teach this course again, thus she hasn't been offered this as a possibility. I mentioned to Kelli [Connell] that she would actually be good teaching a section of the new foundations course. I believe she uses/knows Lightroom. But we are not as you know, obligated to provide more [than] one class to anyone. I am looking forward to [employee L.L.] teaching a studio course in the fall.[44] I assure you that I will work with her, as I do with everyone to get her up to speed. It was a great suggestion by Kelli. [Employee L.L.] is great to work with, dedicated, and very committed to our department. I like her work, and respect the fact that she is a problem solver and not a problem maker.[45] Her part time faculty evaluations have been really good. Feedback from the students is also very good. We can of course discuss the above further in person or on the phone. . . .
>
> Please let me know your thoughts regarding any of the above. I just feel that we have to make our decisions based on the needs of our students, and not people needing additional classes or just because they put a "request" to teach a class on their availability forms. I know from our conversations that you agree with this.

(GC Exh. 106.) Fitzpatrick agreed that he defers to Ernst regarding assignment of classes to faculty members in the studio area of the photography department.[46] (Tr. 913.)

[43] In 2005, Ernst and Vallera were friends, and Ernst asked Vallera if she would be interested in teaching a course at the College. (Tr. 25.) Ernst and Vallera had a falling out in early 2009, and have had a strained relationship since that time. (Tr. 336–337, 1216, 1277–1278.) I have not made findings regarding the specific reason for the 2009 dispute between Ernst and Vallera because the competing accounts of that dispute were equally credible.

It is unclear what specifically prompted Ernst to contact Fitzpatrick with her thoughts about Vallera in March 2012. However, it is an established practice in the photography department for the associate chair to consult with coordinators such as Ernst about faculty class assignments. (R. Exh. 35, pp. 5–6.)

[44] Employee L.L. was a relatively new teacher at the College. Fitzpatrick admitted that Vallera was highly qualified to teach a studio (Introduction to Lighting) class, and was more experienced than employee L.L. (Tr. 878, 887–888.) Fitzpatrick explained, however, that the photography department has an interest in bringing new faculty members into the program to ensure that there is a pool of instructors available to draw from each semester. (Tr. 890–891.)

[45] Ernst admitted that she viewed Vallera as a problem maker, but asserted that she only formed that opinion based on individual, petty concerns that Vallera raised periodically. (Tr. 1211–1214; see also Tr. 921.) I do not credit Ernst's explanation on that point. The record is clear that Vallera was vocal on a host of issues in the photography department (and at the College as a whole), including multiple issues related to the PFAC bargaining unit. It is not plausible that Ernst limited her frustration with Vallera only to the occasions where Vallera raised concerns that would not qualify as union or protected concerted activities.

I also have not credited Ernst's assertion that Vallera was not qualified to teach the Advanced Lighting course. Ernst's assessment is tainted by her negative views of Vallera, and is also undermined by the fact that in January 2009 (shortly after Vallera finished teaching the Advanced Lighting course), Photography Department Academic Manager Liz Chilsen asked Vallera to send her the goals and objectives that she developed for Advanced Lighting so they could be shared with the rest of the photography department. (Tr. 1282; CP Exh. 8.)

Finally, I have considered the fact that Ernst stated that Vallera would be a good fit for the new Foundations course. That recommendation, however, is consistent with my findings about Ernst's views of Vallera, because the Foundations courses were not part of the studio program, and thus assigning Vallera to one of those classes would reduce Ernst's contact with Vallera (a desirable result, from Ernst's perspective). (Tr. 913, 1203–1204, 1206 (noting that Ernst was responsible for the studio area, but was merely part of a team that handled the Foundations courses).)

[46] I do not credit Fitzpatrick's testimony that Ernst's characterization of Vallera as a problem maker had no effect on his decisions faculty class assignments for the summer and fall 2012 semesters. (Tr. 922.) Fitzpatrick himself was new to the College (having started in fall 2011), and admitted that he deferred to Ernst when it came to faculty assignments in the studio and foundations areas. (Tr. 913, 1218.)

j. The College cautions Vallera to direct her requests for bargaining to the correct College personnel

On April 10, Marcus responded to Vallera's March 23 email to explain that the purpose of her (Marcus') March 23 email was to ask PFAC to follow the proper protocol for bargaining. Specifically, Marcus stated:

> [I]t is not appropriate for PFAC to attempt to discuss bargaining/contract related topics with Associate Chairs. The College does not know how much clearer it can make this point: Bargaining issues raised by PFAC should be directed to Len Strazewski, issues arising under the contract should be addressed to Pegeen Quinn. Those are the appropriate avenues for PFAC. Unit members are always encouraged to communicate with the Chair or Associate Chair about their individual concerns or questions. Under the CBA, individual unit members meet with the Chair to informally resolve any grievance.

(R. Exh. 92; see also Tr. 931–932.) Marcus added that it was not clear until Vallera's March 23 email that PFAC wished to bargain about whether the photography department should maintain the status quo with its operations, and promised to forward that issue to Strazewski for a response. Finally, Marcus advised Vallera that the College would interpret Vallera's questions about who authorized the changes in the photography department as a request for information, and accordingly would forward the request to Pegeen Quinn for processing. (R. Exh. 92.)

k. The College finalizes its faculty class assignments for the fall 2012 semester

On April 23, 2012, the College notified Vallera that she was assigned to teach one class in the fall 2012 semester (Introduction to Lighting). (Tr. 294–295; GC Exh. 99.) Employee L.L. was also assigned to teach one Introduction to Lighting class for fall 2012. (GC Exh. 90(d).) The following part-time faculty members in the photography department were assigned to teach more than one class for fall 2012:

Name	Classes Assigned—Fall 2012	Comments
A. B.	Foundations of Photography I Introduction to Lighting	
J.E.	Advanced Retouching Fashion Photography	
B.F.	Advanced Lighting Furniture Construction	Furniture Construction is not in the photography department [Tr. 897–898, 915–916].
K.G.	Foundations of Photography I Documentary Methods	
G.G.	Foundations of Photography I First Year Seminar	First Year Seminar is not in the photography department [Tr. 917].
W.J.	Foundations of Photography I Foundations of Photography I First Year Seminar	First Year Seminar is not in the photography department [Tr. 917].
C.K.	Photography II Workshop Website Publishing I	
A.M.	Digital Imaging I Digital Imaging II	
J.M.	Advanced Lighting Internship: Photography	Internship: Photography is an extra assignment, but not a traditional class, and is thus paid at a lower rate of approximately $25/hour [Tr. 895–896, 917–918].
J.O.	Experimental Photography Experimental Photography	
C.S.	Foundations of Photography I Special Topics in Fine Art Photography	
M.S.	Foundations of Photography I Digital Imaging II Digital Imaging II	

(GC Exh. 90(d); see also Tr. 875–877, 881 (Fitzpatrick admitted that Vallera was competent to teach Introduction to Lighting, View Camera, Foundations of Photography, Advanced View Camera, digital classes, and darkroom classes).) All of the faculty members listed in the table above had sufficient accrued credit hours (21 or more) to preclude being bumped from their classes by a more experienced part-time faculty member (such as Vallera). (R. Exh. 1, art. VII; R. Exh. 46, p. 2.)

On May 1, 2012, Vallera emailed Connell and asked to speak with her about a second class for fall 2012.[47] On May 2, Connell responded:

> We have sent out the teaching assignments for the fall. Due to low enrollment and our new BA [degree requirement] changes, we have fewer classes offered for this fall. As of now, you are only scheduled for one course in the fall.

(R. Exh. 97.)

[47] Earlier on May 1, Vallera and PFAC Representative Mary Lou Carroll attempted to meet with Connell and Fitzpatrick to discuss issues in the photography department. The meeting was canceled when a dispute arose about whether Carroll (who was not part of the photography department) should be permitted to attend the meeting. (Tr. 857–858.)

l. May 13, 2012—Vallera submits an information request about faculty class assignments

On May 13, Vallera wrote to Louise Love and Leonard Strazewski to request that the College bargain over the curriculum and faculty class assignment changes in the photography department, and the effects of those changes. Vallera included an information request in her letter to obtain: a list of all photography part-time faculty that have accrued less than 51 credit hours of teaching experience but were offered a second class; a copy of all part-time faculty availability forms for fall 2012; the number of classes offered to PFAC members that have accrued over 51 credit hours of teaching experience; and the rationale for all changes in the photography department. (GC Exh. 76, p. 2)

m. July 19, 2012—Vallera renews her May 13, 2012 information request

On July 19, 2012, Vallera contacted Strazewski to renew the information request that she submitted on May 13.[48] Strazewski confirmed receipt of Vallera's renewal request later that same day. (GC Exh. 76.) On September 28, 2012, the College provided PFAC with information in response to Vallera's May 13 information request.[49] (Tr. 194, 746; R. Exhs. 46, 48.)

3. Discussion and analysis

a. Did the College violate Section 8(a)(3) or (4) of the Act by failing to assign Vallera any classes to teach for the summer 2012 semester?

The Acting General Counsel and I agree that the allegations regarding the College's failure to assign classes to Vallera should be analyzed under the legal standard that the Board described in *FES*, 331 NLRB 9 (2000). To establish that Vallera's nonselection for certain classes was discriminatory, the Acting General Counsel needed to make the following initial showing: (1) that the College was selecting faculty for class assignments, or had concrete plans to do so, at the time of the alleged unlawful conduct; (2) that Vallera had experience or training relevant to the announced or generally known requirements of the available classes (or in the alternative, that the College has not adhered uniformly to the requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination); and (3) that antiunion animus contributed to the decision not to select Vallera for the class assignments. Once the Acting General Counsel makes its initial showing, the burden will shift to the College to show that it would not have selected Vallera even in the absence of her union activities. If the College fails to show that it would have made the same decisions even in the absence of Vallera's union activities or affiliation, then a violation of Section 8(a)(3) (or 8(a)(4)) has been established. Id. at 12.

There is no dispute that the College needed to select faculty members (including part-time faculty members) to teach classes for the summer 2012 semester. There is also no dispute that Vallera was qualified to teach several classes that the College was offering that semester. The Acting General Counsel runs into difficulty, however, with its initial showing that antiunion animus contributed to the College's decision not to select Vallera for a summer 2012 teaching assignment. Suspicious timing can support a finding of discriminatory animus, but in this case, the probative value of the close timing between Vallera's early 2012 protected activities (including her participation in the trial in Case 30–CA–018888 and PFAC's filing of the charge in Case 13–CA–073486[50]) and the College's decision about summer 2012 class assignments is limited because the College did not deviate from its customary time period for making summer semester teaching assignments. Given that fact, the close timing between Vallera's early 2012 protected activities and the College's February 27, 2012 decision not to offer Vallera's customary View Camera class in the summer 2012 semester was coincidental. See *El Paso Electric Co.*, 355 NLRB 428, 429 (2010) (finding that the probative value of a temporal relationship between the employee's protected activity and the employer's action was diminished where the timing of the employer's action was dictated by the employee). Moreover, the College's decision not to offer View Camera in the summer 2012 semester was not tainted by discriminatory animus.[51] To the contrary, student demand for View Camera had been decreasing since summer 2011, and the drop in demand accelerated after the College reclassified View Camera as an

[48] On June 13, Vallera contacted Strazewski to re-submit her May 13 request that the College bargain with PFAC about curriculum and faculty class assignment changes (and their effects) in the photography department. (GC Exh. 76, pp. 1–2.)

[49] The record is unclear as to whether the College's response was complete. (Compare Tr. 194 and R. Exh. 49 with Tr. 758.) That ambiguity is not material to my analysis.

[50] The charges in Cases 13–CA–076794. 13–CA–078080, and 13–CA–081162 were filed after the College made its summer 2012 faculty class assignments. (GC Exh. 1(m) (charges filed on March 16, April 4, and May 16, 2012, respectively).)

[51] On this point, the Acting General Counsel argued that the College's actions associated with the bargaining disputes between the College and PFAC support a finding that animus contributed to the College's decisions regarding Vallera's class assignments. (GC Posttrial Br. at 58–59 (citing the College's decision to resubmit an old contract proposal the day after it received service of the complaint in Case 30–CA–018888, and the fact that the College blamed Vallera for the breakdown in negotiations for a successor bargaining agreement).) While it is true that, depending on the facts of a given case, evidence of 8(a)(5) violations may support a finding that an employer acted with animus for purposes of an 8(a)(3) claim, that theory does not fit here. Love, Strazewski and Annice Kelly were the key players for the College when it came to bargaining. They had no involvement, however, with the decisions that the College made about Vallera's summer and fall 2012 class assignments. I therefore do not see a basis for drawing a connection (for purposes of animus or otherwise) between the 8(a)(5) violations that the College committed and the 8(a)(3) and (4) claims at issue here.

Similarly, the Acting General Counsel did not establish that a finding of animus could be based on Vallera's interactions with Marcus. While Marcus did respond to some of Vallera's emails about class assignments, her role was limited to addressing Vallera's requests for information and bargaining. There is no evidence that Marcus participated in or influenced Fitzpatrick's decisions about Vallera's summer and fall 2012 class assignments.

elective course in December 2011, leading to the College reasonably deciding not to offer the course in summer 2012.[52]

Since the Acting General Counsel did not present sufficient evidence to make an initial showing that the College discriminated against Vallera when it did not assign her a class to teach for the summer 2012 semester, its 8(a)(3) and (4) claims about that decision fall short. I accordingly recommend that the allegation in paragraphs VI(e)–(f) concerning summer 2012 class assignments be dismissed.

b. Did the College violate Section 8(a)(3) or (4) of the Act by failing to assign Vallera more than one class to teach for the fall 2012 semester?

In contrast to its presentation regarding summer 2012 class assignments, the Acting General Counsel made a strong initial showing that the College discriminated against Vallera when it did not select her to teach a second class for the fall 2012 semester. There is no dispute that the College needed to select faculty members (including part-time faculty members) to teach classes for the fall 2012 semester, or that Vallera was qualified to teach several classes that the College was offering that semester (such as Foundations of Photography, which was the "second" class assigned to several faculty members). The Acting General Counsel also presented the following compelling evidence that antiunion animus contributed to the College's decision: (a) the College decided not to assign Vallera a second fall semester 2012 class shortly after Vallera asked the College to bargain with PFAC about changes to working conditions in the photography department; and, more important, and (b) studio coordinator Elizabeth Ernst sent an email to Fitzpatrick that labeled Vallera as a "problem maker," and discouraged Fitzpatrick from assigning additional classes to faculty members (such as Vallera) just because they requested them on their availability forms. I therefore find that the Acting General Counsel made an initial showing that the College discriminated against Vallera when it made its fall 2012 faculty class assignments.

As its affirmative defense, the College maintains that it did not have enough classes available to assign Vallera a second class for the fall 2012 semester. Consistent with the College's assertion, the evidentiary record shows that only 12 part-time faculty members in the photography department received more than one class to teach in fall 2012. The record also shows, however, that Vallera's chances at receiving an additional class ended when Ernst labeled Vallera as a problem maker because of her protected activities, and effectively discouraged Fitzpatrick from assigning Vallera a second class. As a result, Fitzpatrick's decision not to assign Vallera a second class was tainted by discriminatory animus, stemming from his reliance on Ernst's biased recommendation, and from the fact that Ernst had direct input into Fitzpatrick's consideration of Vallera for a second fall 2012 class assignment. *Bruce Packing Co., Inc.*, 357 NLRB 1084, 1086 (2011) (explaining that "the Board's case law is clear that the anti-union motivation of a supervisor will be imputed to the decision making official, where the supervisor has direct input into the decision"). The College's affirmative defense accordingly fails, and I find that the College violated Section 8(a)(3) of the Act when it failed to assign Vallera more than one class to teach in the fall 2012 semester.[53]

c. Did the College unlawfully fail and refuse to respond to PFAC's May 13, 2012 information request concerning the College's class assignments to part-time faculty in the photography department for fall 2012?

An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration. Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. By contrast, information concerning extra-unit employees is not presumptively relevant, and thus relevance must be shown. *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011). The burden to show relevance is not exceptionally heavy, as the Board uses a broad, discovery-type standard in determining relevance in information requests. Id.

The duty to furnish information requires a reasonable good-faith effort to respond to the request as promptly as circumstances allow. An employer must respond to the information request in a timely manner, and an unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) as a refusal to furnish the information at all. *Castle Hill Health Care Center*, 355 NLRB 1156, 1179 (2010) (citing *Good Life Beverage Co*., 312 NLRB 1060, 1062 fn. 9 (1993), and *Amersig Graphics, Inc*., 334 NLRB 880, 885 (2000)).

The evidentiary record shows that on May 13, 2012, Vallera contacted the College to request information relevant to faculty class assignments in the photography department. Specifically,

[52] Contrary to the Acting General Counsel's assertion in its brief (see GC Posttrial Br. at 62–63), the Acting General Counsel did not demonstrate that the College had a past practice of finding replacement classes for faculty who did not receive their usual summer class assignments. See *Palm Beach Metro Transportation, LLC*, 357 NLRB 180, 183–184 (2011) (noting that the party asserting the existence of a past practice bears the burden of proof on the issue, and that the evidence must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis), enfd. 459 Fed. Appx. 874 (11th Cir. 2012). The College's class assignment records do not show any such past practice. (See GC Exhs. 90(c)–(d) (showing that it was not uncommon for a faculty member to teach a class one summer, and then not teach any classes the following summer, and also showing no clear pattern of faculty receiving "extra" classes in the fall semester after not receiving a summer semester class (such as employees C.E. (2012), G.K. (2011), and P.C. (2011).) Further, to the extent that Vallera testified that the College did have a past practice of finding replacement classes (see Tr. 1293), I did not credit that testimony because although it was unrebutted, Vallera's testimony on that point was not based on her personal knowledge, and was therefore speculative and unreliable.

[53] Ernst's comments about Vallera, and Fitzpatrick's resulting decision not to assign Vallera a second class, were based on Vallera's union activities, and not based on Vallera's participation in the trial in Case 30–CA–018888 or on the Board charges that PFAC filed that related to Vallera's union activities. I therefore do not find that the College violated Sec. 8(a)(4) of the Act.

Vallera asked for: information about part-time photography faculty that were offered a second class to teach; a copy of all part-time faculty availability forms for fall 2012; the number of classes offered to PFAC members that have accrued over 51 credit hours of teaching experience; and the rationale for all changes in the photography department. For 2 months, the College did not respond at all to Vallera's request, prompting her to renew her request on July 19, 2012. An additional 2 months passed before the College (on September 28, 2012) finally provided Vallera with materials in response to her information request.

Based on those undisputed facts, I find that the College unreasonably delayed in responding to PFAC's May 13, 2012 information request. Although the College maintains that PFAC could have obtained some of the information that it sought by performing its own search on the College's online course database, and that PFAC liaison Pegeen Quinn responded to the information request as quickly as possible under the circum-stances (see R. Posttrial Br. at 71–72), I do not find either of those arguments to be persuasive. Regardless of PFAC's ability to obtain some information through its own research, PFAC's information requests were reasonable and relevant because PFAC needed to have the College's data and responses to establish a foundation for discussion if and when the parties met to discuss faculty class assignments at the bargaining table. See *Castle Hill Health Care Center*, 355 NLRB at 1183 (noting that an employer's duty to provide relevant information in its possession is not excused by the fact that the information may be obtained elsewhere). Further, it was the College's decision to leave information request responses solely in the hands of one person (Pegeen Quinn)—to the extent that the College's staffing decision resulted in unreasonable delays, those delays are chargeable to the College.

In light of the foregoing analysis, I find that the College unlawfully delayed in responding to PFAC's May 13, 2012 information request concerning class assignments to part-time faculty in the photography department for the fall 2012 semester.[54]

G. Alleged Unilateral Change to the Scope of the Bargaining Unit and Repudiation of the Grievance Procedure

1. Complaint allegations

The complaint alleges that on or about March 23, 2012, Respondent unilaterally changed the scope of the PFAC bargaining unit by only applying the terms of the collective-bargaining agreement to individuals currently teaching a course. (GC Exh. 1(ff), pars. X(a)–(c) (alleging violation of Sec. 8(a)(5) and (1), and Sec. 8(d)).)

The complaint also alleges that on or about March 23, 2012, Respondent repudiated the grievance procedure contained in Respondent and PFAC's collective-bargaining agreement. (GC Exh. 1(ff), par. X(d) (alleging violation of Sec. 8(a)(5) and (1), and Sec. 8(d)).)

2. Findings of fact

a. The grievance procedure

Under the existing collective-bargaining agreement between the College and PFAC, the parties agreed to a grievance procedure for any "complaint by a unit member, group of unit members, or [PFAC] that there has been a violation, misinterpretation, or misapplication of any provision" of the collective-bargaining agreement. (R. Exh. 1, art. IX.) Per the collective-bargaining agreement, parties should first use their best efforts to resolve grievances informally via a meeting with the relevant department chair. However, if the informal process fails, the grieving party may initiate formal grievance proceedings that are composed of the following steps:

> Step 1—The grieving party must file a written grievance with the College's PFAC liaison. The grievance "must cite the Article allegedly violated, misinterpreted, or misapplied; the dates of the events which are the subject of the grievance; the person present at the events, if applicable; the facts supporting the grievance, and the requested remedy." Once the grievance has been filed, the PFAC liaison shall meet with the grievant, and then render a written decision on the grievance.
>
> Step 2—If the grievance is not resolved at Step 1, the grievant may submit the grievance to the Provost/Vice President for Academic Affairs. The Provost, or his/her designee, shall meet with the grievant and then render a written decision.
>
> Step 3—If the grievance is not resolved at Step 2, then PFAC may submit the grievance to binding arbitration.

(R. Exh. 1, art. IX.)

b. Arbitrator's decision in employee R.P.'s grievance about teaching assignments

On February 12, 2012, an arbitrator issued an award in a grievance that part-time faculty member R.P. filed against the College. R.P. claimed that the College violated the collective-bargaining agreement when it did not assign R.P. a class to teach in the fall 2010 semester (R.P. was initially assigned a class, but the College withdrew that assignment before the fall 2010 semester began). (GC Exh. 54.) After reviewing the collective-bargaining agreement, the arbitrator found that the agreement "carefully established that an adjunct, or part-time, instructor is employed only when he or she is teaching a course during a finite period of time. Between teaching assignments the adjunct has no status as an employee. He or she is hired solely for the period of time during which the teaching occurs."[55] (GC Exh. 54, p. 10.) Accordingly, the arbitrator ruled

[54] My finding here relies on a theory (unreasonable delay in responding to an information request) that is slightly different from the theory that the Acting General Counsel alleged in the complaint (failure and refusal to respond to an information request). However, the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. That standard is satisfied here. See *Pergament United Sales*, 296 NLRB 333, 335 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

[55] In support of his finding that part-time faculty members are employed only when they are teaching a course during a finite period of time, the arbitrator cited the following provisions from the collective-bargaining agreement (among others):

> The final decision of who teaches each course is the sole prerogative

that the College did not violate the collective-bargaining agreement when it withdrew R.P.'s teaching assignment, because R.P. was an applicant for employment and thus "had no standing to question his future employment." (GC Exh. 54, p. 12.)

c. Susan Marcus' March 23 letter to Vallera

As previously noted, in spring 2012, Vallera was engaging in a dialogue with the photography department chair and associate chair about her summer and fall 2012 class assignments (or lack thereof). On March 23, Susan Marcus intervened in that discussion to respond to issues that Vallera raised in a March 19 email to the photography department. Specifically, in response to Vallera's request for a rationale for why she lost her summer class, Marcus asked Vallera to "[p]lease clarify your rationale that there was a 'loss of my' summer class in relation to the decisions in the [employee R.P.] arbitration and case # (13–CA–045973)."[56]

Marcus also responded to Vallera's request that the College bargain with PFAC about its decisions to make changes to the photography department's class assignment procedures and curriculum, and the effects of those decisions. On that issue, Marcus stated as follows:

> With respect to your request for a meeting about the above topics, please also see the decisions in the [employee R.P.] arbitration and case # (13–CA–45973).[57] Additionally, as you have been informed repeatedly, these questions should not be asked of the Associate Chair [Connell]. If you persist in ignoring appropriate channels, your requests will not be forwarded to the appropriate office.

(GC Exh. 92; see also Tr. 926–928, 935.)

Marcus' intervention prompted a swift response from Vallera, as later on March 23, Vallera emailed Marcus and asserted:

> As you have been repeatedly warned in the past, PFAC will not tolerate any intimidation tactics on the part of this administration. Your tactics [] of avoiding to answer questions, intimidating, and not allowing chairs of departments to meet with PFAC to resolve issues will not be tolerated. PFAC absolutely has a right to request a demand to bargain over the terms [and] conditions of employment and what you seem to be avoiding is the very important issue of remaining status quo while in bargaining.

(GC Exh. 92.) Vallera went on to contend that the College changed the status quo by not including part-time faculty in the online course catalog, and asked Marcus to explain whether the photography department chair made that change on his own, or instead pursuant to a directive from someone else at the College. (Id.)

d. The College clarifies its position about PFAC bargaining requests

On April 10, Marcus responded to Vallera's March 23 email to explain that the purpose of her (Marcus') March 23 email was to ask PFAC to follow the proper protocol for bargaining. Specifically, Marcus stated:

> [I]t is not appropriate for PFAC to attempt to discuss bargaining/contract related topics with Associate Chairs. The College does not know how much clearer it can make this point: Bargaining issues raised by PFAC should be directed to Len Strazewski, issues arising under the contract should be addressed to Pegeen Quinn. Those are the appropriate avenues for PFAC. Unit members are always encouraged to communicate with the Chair or Associate Chair about their individual concerns or questions. Under the CBA, individual unit members meet with the Chair to informally resolve any grievance.

(R. Exh. 92; see also Tr. 931–932.) Marcus added that it was not clear until Vallera's March 23 email that PFAC wished to bargain about whether the photography department should maintain the status quo with its operations, and promised to forward that issue to Strazewski for a response. Finally, Marcus advised Vallera that the College would interpret Vallera's questions about who authorized the changes in the photography department as a request for information, and accordingly would forward the request to Pegeen Quinn for processing. (R. Exh. 92.)

e. PFAC files a grievance about faculty class assignments, and the College's responses

On May 1, PFAC Representative Mary Lou Carroll filed a grievance on behalf of PFAC regarding summer 2012 class assignments. In the grievance, PFAC alleged that the College "abandoned its obligation to distribute teaching assignments for

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> of the department Chairperson. [Artl. VII, sec. 2];
>
> The receipt and submission of a teaching availability form by a unit member does not obligate the College in any way to provide an appointment or a particular assignment to that unit member. . . . In addition, every form must include the following statement: "Submission of this form constitutes a request, not a guarantee of teaching assignment. Further, since course enrollment, as well as your qualifications and evaluations, determine teaching assignments, no assignment can be considered final until student registration is completed. [Art. VII, sec. 4]; and
>
> The College may suspend, with or without pay, discharge, or take other appropriate disciplinary action against a unit member for just cause. . . . For purposes of this Agreement, "discharge" shall mean termination of employment during a semester and shall not refer to the failure to rehire or to renew a faculty member's appointment to teach for future semesters. This Article X shall not apply to decisions by the College not to rehire or not to renew a unit member's appointment to teach future semesters. [Art. X, sec. 1.]

(GC Exh. 54, pp. 2–3, 10–12.)

[56] In Case 13–CA–45973 (a charge asserting that the College made unlawful changes to Vallera's class schedule), the Acting General Counsel denied PFAC's appeal from the Regional Director's refusal to issue a complaint. In support of that decision, the Acting General Counsel stated that "the evidence indicated no contractual right of part-time faculty to any particular course or schedule." (R. Exh. 7.)

[57] Marcus admitted that she should have forwarded Vallera's request for bargaining to Leonard Strazewski, since he was handling all bargaining with PFAC. (Tr. 980–982.) Marcus' expertise is with handling grievances that allege that the College violated the existing collective-bargaining agreement. (Tr. 980.)

Summer 2012 classes on the basis of adjunct faculty" summer availability, summer teaching history, accrued credit hours, applicable teaching qualifications, and summer student enrollment and interest. (GC Exh. 93(a) (citing the "Appointment/Reappointment" section of the collective-bargaining agreement, past practice, and principles of reasonableness and fairness in support of PFAC's position).) PFAC also alleged that the College failed to make an effort to assign alternative classes to affected PFAC members, and unilaterally adopted new criteria/methods for making faculty class assignments. (Id.)

f. The College's May 8, 2012 response to PFAC's request for effects bargaining about the prioritization process

On May 8, 2012, interim associate provost Leonard Strazewski responded to a request that Vallera made for the College bargain with PFAC about the prioritization process. On the issue of effects bargaining, Strazewski maintained that no such bargaining was warranted. In support of the College's view, Strazewski asserted that the arbitrator's decision in employee R.P.'s grievance established that PFAC did not have standing to bargain about the potential effects that changes proposed through the prioritization process could have on work assignments, job qualification requirements, and job availability for PFAC members. (See sec. B(2)(e), supra.)

g. The College responds to PFAC's grievance

On May 15, Susan Marcus responded to PFAC's grievance regarding summer 2012 faculty class assignments. In her email, Marcus asserted that the grievance was untimely because PFAC did not request an informal meeting in the proper timeframe. Marcus also asserted that the College intended to honor the rationale that the arbitrator set forth in his February 12 decision (in employee R.P.'s grievance). Specifically, in the College's view, the arbitrator's decision established that "outside of the narrow exceptions under the Appointment/Reappointment pro-vision of the CBA, a unit member is considered to be an applicant for employment prior to each semester and does not have standing to question or challenge his future employment at the college."[58] In light of those concerns, Marcus stated that the College would not be able to hold a step 1 grievance hearing until Carroll sent documentation showing that she did request an informal meeting with her department chair, and documentation showing that she/PFAC had standing to pursue the grievance under the collective-bargaining agreement. (GC Exh. 93(b).)

On June 1, Pegeen Quinn wrote to Carroll to followup on Marcus' May 1 email to Carroll about the information that the College required before it could hold a step 1 grievance meeting. Quinn stated that PFAC still had not provided the College with information showing that a step 1 meeting was appropriate in light of the concerns that the College raised about timeliness and whether PFAC had standing to bring a grievance about future employment. Quinn renewed the College's request that PFAC provide information that addressed those issues. (GC Exh. 93(c).)

The College modified its position somewhat on June 8, when Quinn notified Carroll that notwithstanding the College's concerns about whether PFAC's grievance was timely and whether PFAC had standing, the College would agree to hold a step 1 grievance meeting. Accordingly, Quinn asked Carroll to contact her to schedule a meeting, and also asked Carroll to provide the information about timeliness, standing and the substantive merits of the grievance before the meeting. (GC Exh. 93(d).)

h. June 2011—the College files a position statement in response to the allegation that it unilaterally changed the scope of the PFAC bargaining unit

On June 11, the College submitted a position statement to the Region in Case 13–CA–081162. In its position statement, the College rejected PFAC's claim that through its reliance on the arbitrator's decision in employee R.P.'s case, the College unilaterally changed the scope of the PFAC bargaining unit. As the College explained, it "has never taken the position that PFAC does not represent adjuncts (who have completed at least one semester) in between semesters or that the scope of the bargaining unit has somehow changed." Instead, the College maintained that the arbitrator's decision simply defined the extent of coverage that the existing collective-bargaining agreement provided to adjuncts—that is, that adjuncts are only College employees during the semesters they are actually teaching. (GC Exh. 94(a), pp. 2–3.)

i. The College denies PFAC's grievance about faculty class assignments

On July 2, 2012, Quinn notified Carroll that the College was denying the grievance that she filed on behalf of PFAC on May 1.[59] First, Quinn asserted that PFAC/Carroll lacked standing to bring the grievance because: Carroll did not request an informal meeting with her department chair; PFAC did not provide information about the individual grieving parties or underlying facts; and per the arbitrator's decision in employee R.P.'s case, individual unit members have no standing to question their future employment. Second, Quinn stated that even if Carroll and/or PFAC did have standing to file the grievance, Carroll failed to demonstrate that the College was required under the collective-bargaining agreement to assign classes to an adjunct based on the number of credit hours that they had accrued, or that the College otherwise violated the collective-bargaining agreement when it made its summer 2012 faculty class assignments. (GC Exh. 93(e).)

3. Discussion and analysis

For the complaint allegations at issue in this section, the Acting General Counsel essentially takes issue with how the College has applied the reasoning in the arbitrator's decision in employee R.P.'s case to other disagreements with PFAC. Spe-

[58] PFAC has not agreed to any changes to the grievance procedure set forth in the collective-bargaining agreement. (Tr. 313.)

[59] The step 1 hearing for the grievance was held on June 18, 2012, and addressed not only the grievance that Carroll filed on May 1 regarding faculty class assignments for summer 2012, but also another grievance that Carroll filed on May 2. (GC Exh. 93(e).)

cifically, the Acting General Counsel maintains that although the arbitrator's decision only a narrow issue, the College seized upon the decision to "redefine its bargaining relationship with the Union to one that essentially ceases every time the College finishes an academic semester. . . . Flowing from this interpretation, the College has taken the position that the Union therefore has no right to bargain over future changes in terms and conditions of employment or the effects of such changes because the Union has no standing under the contract to demand such bargaining. In so doing, the [College] has unilaterally altered the scope of the bargaining unit and repudiated the grievance procedure." (GC Posttrial Br. at 43.)

In its defense, the College maintains that it is entitled to rely on the arbitrator's decision as a binding interpretation of the terms and coverage of the existing collective-bargaining agreement. The College therefore denies that it acted unilaterally or made any changes to the contract. (R. Posttrial Br. at 61.)

The Acting General Counsel advances two separate legal theories for the complaint allegations at issue here. First, the Acting General Counsel challenges the College's actions as unlawful unilateral changes that violate Section 8(a)(5) and (1) of the Act. "Under the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes." *Lawrence Livermore National Security, LLC*, 357 NLRB 203, 205 (2011). The Act prohibits employers from taking unilateral action regarding mandatory subjects of bargaining such as rates of pay, wages, hours of employment, and other conditions of employment. *Garden Grove Hospital & Medical Center*, 357 NLRB 653, 653 fn. 4, 5 (2011). Notably, an employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if those practices are not required by a collective-bargaining agreement. Id; see also *Palm Beach Metro Transportation, LLC*, 357 NLRB 180, 183–184 (2011) (noting that the party asserting the existence of a past practice bears the burden of proof on the issue, and that the evidence must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis), enfd. 459 Fed. Appx. 874 (11th Cir. 2012).

Second, the Acting General Counsel challenges the Colleges actions as unlawful contract modifications within the meaning of Section 8(d) of the Act, and in violation of Section 8(a)(5) and (1) of the Act. Section 8(d) states that "where there is in effect a collective-bargaining contract . . . no party to such contract shall terminate or modify such contract." In a contract modification case, the Acting General Counsel must identify a contractual provision, and then show that the employer modified that contractual provision without the consent of the union.

Where an employer has a "sound arguable basis" for its interpretation of a contract and is not motivated by union animus or acting in bad faith, the Board ordinarily will not find a violation. *Bath Iron Works Corp.*, 345 NLRB 499, 501–502 (2005), affd. 475 F.3d 14 (1st Cir. 2007).

a. Did the College violate the Act on or about March 23, 2012, by unilaterally changing the scope of the PFAC bargaining unit by only applying the terms of the collective-bargaining agreement to individuals currently teaching a course?

The Acting General Counsel maintains that the College violated the Act by relying on the arbitrator's decision to unilaterally redefine the bargaining unit as only including PFAC members who were currently teaching a course. The Acting General Counsel's argument fails, however, because the evidentiary record shows that the College did not change the scope of the bargaining unit.

On March 19, 2012, Vallera requested a meeting about changes that the photography department allegedly made to its faculty class assignment procedures, and the changes to the photography department's curriculum. There is no dispute that on March 23, 2012, the College (through Susan Marcus) responded to Vallera's request by advising her to review the arbitrator's decision and the dismissal of the allegations in Case 13–CA–045973. If that were the end of the story, then there would be some merit to the Acting General Counsel's assertion that the College changed the scope of the bargaining unit, because through her brief email, Marcus arguably took the position that the College did not need to bargain with PFAC about the issues in the photography department that Vallera identified. However, the evidentiary record clearly shows that after reviewing Vallera's March 23 email, Marcus recognized PFAC's bargaining request and notified Vallera on April 10, 2012, that she would forward PFAC's request to Leonard Strazewski for a response. (See FOF, secs. c, d, supra.)

For similar reasons, I am not persuaded that the College modified the scope of the bargaining unit when Strazewski emailed Vallera on May 8 to refuse PFAC's request for effects bargaining about the prioritization process. (See PFAC Posttrial Br. at 52.) As I found when I analyzed the complaint allegation about that issue, the College's refusal to engage in effects bargaining on May 8 was lawful because PFAC's request for such bargaining was premature. (See sec. C(3), supra.) To the extent that Strazewski asserted that PFAC "lacked standing" to bargain about the effects of the prioritization process (presumably because of the arbitrator's decision and analysis), the College quickly clarified its position on that point when it affirmed in its position statement that PFAC represents its members at all times (i.e., during and between semesters when they are teaching). (See FOF, secs. f, h, supra.)

Based on those facts, I find that the College did not make any unilateral changes to the scope of the PFAC bargaining unit. I also find that the College did not modify any contractual provisions about the scope of the bargaining unit. To the contrary, after sending emails that erroneously suggested that the arbitrator's decision relieved the College of its duty to engage in effects bargaining, the College corrected its errors and reaffirmed the full extent of PFAC's right to bargain. I therefore recommend that the allegations in paragraphs X(a)–(c) of the complaint be dismissed.

b. Did the College violate the Act on or about March 23, 2012, by repudiating the grievance procedure contained in its collective-bargaining agreement with PFAC?

The Acting General Counsel also takes issue with the College's reliance on the arbitrator's decision when it responded to PFAC's grievance about faculty class assignments. The evidentiary record does show that the College repeatedly asserted that based on the arbitrator's decision, PFAC lacked standing to pursue a grievance about future teaching assignments. The record also shows, however, that notwithstanding its questions about PFAC's standing, the College ultimately did process PFAC's grievance and respond to it on the merits. (FOF, secs. f, h, supra.)

After considering the applicable case law, I find that the College did not repudiate the grievance procedure as alleged in the complaint. The Board's decision in *Velan Valve Corp*., 316 NLRB 1273 (1995), is instructive. In that case, the Board considered whether an employer's refusal to arbitrate certain untimely grievances violated Section 8(a)(5) and (1) of the Act, and set forth the following principles:

> It is well settled that not every employer refusal to arbitrate violates Section 8(a)(5). *Mid-American Milling Co*., 282 NLRB 926 (1987). Where there is a refusal to arbitrate all grievances, or where the refusal to arbitrate a particular class of grievances amounts to a wholesale repudiation of the contract, a violation will be found. See *Indiana & Michigan Electric Co*., 284 NLRB 53 (1987). Conversely, if the refusal to arbitrate is limited to a single grievance or specifically defined, ''narrow class'' of grievances, Section 8(a)(5) is not violated. *GAF Corp*., 265 NLRB 1361, 1365 (1982); *Mid-American Milling Co*., supra. The relevant inquiry in determining whether an employer's refusal to arbitrate violates the Act is whether the employer, by its refusal, has thereby unilaterally modified terms and conditions of employment during the contract term.

Velan Valve Corp., 316 NLRB at 1274. Applying that standard, the Board held that the employer did not violate the Act because its "refusal to arbitrate on timeliness grounds was not tantamount to a wholesale repudiation of the contractual arbitration provision." Id.; compare *Exxon Chemical Co.*, 340 NLRB 357, 359 (2003) (employer's refusal to arbitrate a wide range of contractual issues violated the Act because the employer's refusal amounted to a wholesale repudiation of the collective-bargaining agreement), enfd. 386 F.3d 1160 (D.C. Cir. 2004).

As with the employer in *Velan Valve*, in this case the College did not engage in a wholesale repudiation of the grievance procedure. Instead, the College questioned PFAC's standing to pursue a narrow class of grievances—namely, grievances that addressed faculty class assignments and thus were arguably covered by the arbitrator's decision and rationale. Thus, consistent with *Velan Valve*, the College did not violate Section 8(a)(5) of the Act.

Nor, for that matter, did the College violate Section 8(d) of the Act. At a minimum, the arbitrator's decision supplied a sound arguable basis for the College's position that PFAC did not have standing to pursue its grievance about faculty class assignments. Since the Acting General Counsel did not show that the College acted with antiunion animus or in bad faith when it invoked the arbitrator's decision, the College acted lawfully when it relied on the arbitrator's decision in its responses to PFAC's grievance. I therefore recommend that the allegation in paragraph X(d) of the complaint be dismissed.

H. Investigation of Vallera for Misconduct

1. Complaint allegations

The complaint alleges that because Diana Vallera engaged in union and protected concerted activities, and because she testified in Case 30–CA–018888, and cooperated in the investigation (including providing affidavits to the Board) in Cases 13–CA–073486, 13–CA–076794, 13–CA–078080, and 13–CA–081162, in April or May 2012, the College began investigating Diana Vallera for alleged misconduct concerning claims about employees of the College's office of general counsel. (GC Exh. 1(ff), pars. VI(e)–(f) (alleging violations of Sec. 8(a)(3), (4), and (1) of the Act).)

The complaint also alleges that because Diana Vallera engaged in union and protected concerted activities, and because she testified in Case 30–CA–018888, and cooperated in the investigation (including providing affidavits to the Board) in Cases 13–CA–073486, 13–CA–076794, 13–CA–078080, and 13–CA–081162, on or about May 14, 2012, the College issued Diana Vallera a notice of "Complaint of Misconduct" concerning claims about employees of the College's office of general counsel. (GC Exh. 1(ff), pars. VI(e)–(f) (alleging violations of Sec. 8(a)(3), (4), and (1) of the Act).)

And, the complaint alleges that since on or about June 5, 2012, the College has failed and refused to provide PFAC with information that PFAC requested on May 17, 2012, concerning the nature of and basis for the College's investigation of Diana Vallera for misconduct. (GC Exh. 1(ff), pars. VIII(c), (g) (alleging violation of Sec. 8(a)(5) and (1)).)

2. Findings of fact

a. Alleged surveillance incident at Vallera's home

On January 30, 2012, Diana Vallera was teaching when she received a phone call from her nanny, who reported seeing a man who appeared to be taking pictures outside of Vallera's home (as well as a woman who remained in a car parked in front of the home). Vallera went to her home, and after speaking with her nanny, contacted the police to file a police report. (Tr. 181–182; R. Exh. 77.)

During the conversation with the police officer who responded to Vallera's home, Vallera's nanny described the man that she encountered. The nanny's description prompted Vallera to remark that the description sounded like someone from the College's general counsel's office (employee P.D.). Accordingly, the police officer asked Vallera to obtain a photograph of P.D. and show it to her nanny to see if she could identify P.D. as the man who was at Vallera's home. Vallera obtained a photograph of P.D. from PFAC's steering committee, and Vallera's nanny reviewed the photograph and identified

P.D. as the man that she saw.[60] After a couple of days, the police officer notified Vallera that the incident was a civil matter and not a criminal matter. (Tr. 183–184, 383–385, 387–388; R. Exh. 77.)

b. Vallera's union activities, including references to alleged surveillance

On February 6–8, the Acting General Counsel, the College and PFAC litigated a trial in Case 30–CA–018888. (GC Exh. 7.) Vallera testified as a witness for the Acting General Counsel/PFAC during the trial, and also sat at counsels' table during the trial. (Tr. 189; GC Exh. 7.)

On March 2, Vallera gave a speech at the National Education Association Higher Education Conference, held in Chicago. During her speech, Vallera spoke about "the crisis throughout the country around higher education specifically with the exploitation of part-time faculty," and observed that the crisis provided an opportunity for unions to organize. To illustrate her point, Vallera described PFAC's and her experience at the College, and mentioned the police report that was filed about the January 30, 2012 surveillance at her home. (Tr. 186–188, 370–372.)

On April 14, Vallera participated in a PFAC membership meeting attended by approximately 75 PFAC members. At the meeting, PFAC grievance chair Susan Tyma gave an update about the recent trial before the Board in Case 30–CA–018888, potential new charges that PFAC might file, and surveillance of Vallera's home. Vallera advised the meeting participants that she notified the IEA about the surveillance issue, and that the IEA was looking into the matter. (Tr. 188–190.) Meeting attendees also discussed having a vote of "no confidence" against the College administration. In connection with that discussion, PFAC later sent an email to its members that asked them to register their opinion on a vote of "no confidence." The email cited various reasons for a no confidence vote, including the assertion that "[t]his administration has attempted to prevent the union and its leadership from communicating with the wider college community, and has attempted surveillance of the union leadership." (GC Exh. 74; see also Tr. 190–192.)

Finally, between January 30 and May 16, 2012, PFAC filed charges with the Board in Cases 13–CA–073486, 13–CA–076794, 13–CA–078080, and 13–CA–081162 that related to Vallera's activities as PFAC's president. (GC Exhs. 1(a), (e), (g), (i), (m), and (s) (original and amended charges).)

c. Complaint of misconduct filed against Vallera

On April 19, Annice Kelly, the College's general counsel, sent an email to Vice President for Human Resources Ellen Krutz to submit a formal complaint against Vallera. Kelly stated as follows in her email:

> This morning I was informed by Louise [Love] that Diana Vallera has been telling people that me/my office has been conducting surveillance of her/her nanny. She has told people that she has filed a police report with the Evanston police.
>
> A couple of months ago I did receive a phone call from someone claiming to be an Evanston police officer asking me vague questions about being at some unidentified person's house in Evanston and a complaint being made. At the time I was confused by the call and thought it very odd. It did not make sense to me that if they had my license plate number (which the officer claimed, but then when I asked him what it was he could not give it to me) then why were they calling me at work and not at home. How did he connect my car to my work? It was very odd. It was a short conversation and in the end he said he would get back to me but never did.
>
> Now hearing what Louise has said, this phone call makes sense and it gives credence that Diana is actually saying these things. These untrue statements have the potential to be career ending as it puts my law license in jeopardy.
>
> I would like this matter investigated. Consider this a formal complaint against Diana Vallera for making false, damaging statements about me/my office by alleging we are involved in criminal activity. I would like Columbia to investigate this as I believe it is misconduct. Of course, Columbia should follow its policies and the CBA in conducting the investigation. Given my involvement, and that of my office, I think it appropriate that the OGC [recuse] itself from the investigation. If you feel the need to seek legal counsel during the course of the investigation, that you would normally seek from the OGC, I think you should seek it. I would recommend using an attorney who has not represented Columbia or that the OGC is not associated with so that we avoid all [appearance] of undue influence.

(GC Exh. 75; see also CP Exh. 4, p. 25 (noting that Louise Love learned of this issue from her husband, who had learned of the incident from a part-time faculty member).) Krutz forwarded Kelly's complaint to Louise Love for processing, since the office of Academic Affairs handles faculty personnel matters. (CP Exh. 4, p. 22.)

d. The College learns of additional public statements about alleged surveillance at Vallera's home

The following day, Robert Koverman, the College's associate vice president for Campus Safety and Security, notified Love and three other College administrators that PFAC's request for a "no confidence" vote had been posted on a website for Occupy Columbia.[61] (GC Exh. 100 (including a copy of PFAC's request for a no confidence vote and the allegation that the College had engaged in surveillance of union leadership).) PFAC was not involved in placing the email on the Occupy Columbia website. (Tr. 240.)

On April 26, PFAC filed an amended charge in Case 13–CA–076794 to allege (among other things) that the College violated the Act by creating the appearance of surveillance.

[60] I emphasize here that I take no position on whether Vallera's nanny was correct when she identified employee P.D. as the man who she saw in front of Vallera's home. I have only set forth these facts to outline the basis for Vallera's belief that one of the College's agents was taking pictures at her home.

[61] In December 2011, PFAC joined a coalition with students, faculty, and staff to protest various conditions at the College. The protest effort was associated with Occupy Columbia, a branch of the national Occupy Movement. (See Tr. 166–170, 1109–1110; GC Exh. 69.)

(Tr. 324; GC Exh. 84(b).) Two days later, Vallera and two full-time College faculty members attended an American Association of University Professors (AAUP) meeting. At the meeting, Vallera spoke about what was happening at Columbia College, and mentioned the police report that she filed concerning the possible surveillance at her home. (Tr. 206–208, 382.) After Vallera spoke, one of the full-time professors from the College who was at the meeting told Vallera that her remarks about what was happening at her home were very serious, and added that if attorneys did come to Vallera's home, something had to be done about it. (Tr. 382–383.)

e. The College begins investigating Vallera for misconduct

Love assigned interim associate provost Leonard Strazewski and Associate Vice President for Academic Affairs Susan Marcus to investigate Kelly's complaint against Vallera. (Tr. 495, 1086.) Accordingly, on May 14, Strazewski sent Vallera an e-mail that stated as follows:

> Dear Ms. Vallera:
>
> A complaint of misconduct has been made against you by [the College's] office of the General Counsel. The Office of the Provost/Academic Affairs is conducting a neutral and impartial investigation. You may have union representation at the investigatory meeting.
>
> We would like to proceed within ten (10) days following the re-opening of the College after the closing for the NATO summit May 17–22. Please reply with your available dates.

(GC Exh. 77.)

f. PFAC information request about the investigation

Vallera notified IEA organizer Bill Silver about Strazewski's email and the complaint of misconduct. Acting on Vallera's behalf, on May 17, Silver sent Strazewski an information request that sought the following information: (1) a copy of the complaint against Vallera; (2) all documentation used in preparing, or offered in support of, the allegations in the complaint; (3) the steps that Strazewski's office has taken or will take to ensure that the investigation is neutral and impartial; (4) a copy of the college policy under which the complaint was initiated and processed; (5) the names of those initiating the complaint and an explanation of why the complaint was initiated by an office instead of individuals; (6) an explanation for why the investigation was assigned to the Office of the Provost/Academic Affairs instead of Vallera's supervisor, and when the assignment was made; and (7) the total number of complaints that the College's office of general counsel has issued against employees for misconduct, including the names of the employees who were charged with misconduct and information about how each such complaint was ultimately resolved. Silver asked Strazewski to provide a copy of the complaint within 48 hours, and to provide the remaining information within 10 days. (Tr. 422–424; GC Exh. 78.)

Hearing no response from the College, Silver renewed his request for information in a followup email to Strazewski on May 30. (GC Exh. 79.) Strazewski responded later that same day with a brief email that stated that the charge against Vallera "was filed by the Columbia College Chicago general counsel against Diana Vallera for making 'false, damaging statements' about the general counsel and her office by alleging the office was involved in criminal activity such as personal surveillance." Strazewski proposed that he and Vallera meet on June 5, 6, or 7 to discuss the facts of the complaint. (GC Exh. 80.)

On June 4, Silver acknowledged receiving Strazewski's May 30 email and request for a meeting, but reiterated the Union's request for a copy of the full complaint before any such meeting to ensure that the meeting would be as productive as possible, and to avoid unnecessary delays that would result if the Union required time to review the complaint. Silver also stated that the Union still needed the additional information that it requested, because that information was necessary for the Union to evaluate whether Vallera was being singled out and treated in a discriminatory manner. (GC Exh. 81.) Silver subsequently notified Strazewski that Vallera would be available to meet on June 6. (GC Exh. 82.)

On June 5, Strazewski agreed to meet on June 6, subject to Vallera confirming the proposed meeting date and time. Regarding the Union's information requests, Strazewski responded that "this is a confidential inquiry into a complaint filed by the general counsel regarding a matter that does not appear to be directly related to union activity, bargaining or the mandatory subjects of bargaining, so I have not responded directly to PFAC inquiries. I expect my questions and our conversation will be between us though I understand you have *Weingarten* rights to union representation. I expect to have a nonparticipating notetaker present." (GC Exh. 83.) Strazewski did not provide any information in response to PFAC's information requests about the misconduct investigation. (Tr. 226, 427, 1108, 1171.)

g. Strazewski interviews Vallera and completes investigation

Vallera and Silver finally met with Strazewski on June 6 (with a notetaker provided by the College present). (Tr. 202; CP Exh. 4, p. 8.) Early in the meeting, Silver asked Strazewski to explain what policy Vallera violated. Strazewski responded that the misconduct charge was based on public remarks that Vallera made about the alleged surveillance at her home. Strazewski added that there was no written policy that applied, other than a general faculty misconduct policy for which there was no formal procedure. (Tr. 205; CP Exh. 4, p. 8.) Silver also asked what evidence Strazewski was relying on in the investigation, and Strazewski identified the remarks that Vallera made at the April 28 AAUP meeting (as reported by full-time faculty members who attended that meeting), a redacted copy of the police report that Vallera filed, and statements that PFAC members and representatives made at PFAC meetings and in written material about the alleged surveillance at Vallera's home. (Tr. 203, 430, 1091–1093, 1095; CP Exh. 4, p. 9; see also CP Exh. 3 (Facebook posting made by a PFAC member); R. Exh. 78; and Tr. 331 (PFAC steering committee newsletters and communications that were not published by Vallera).) Silver asked for a copy of the evidence that Strazewski identified, but Strazewski refused. (Tr. 204.)

Strazewski then asked Vallera questions about what happened at her home on January 30, and how employee P.D. was identified as the person who was at Vallera's home. In connection with those questions, Strazewski asserted that if the College determined that no one from the College's office of general counsel was at Vallera's home on January 30, then Vallera would be disciplined. (Tr. 204; CP Exh. 4, p. 9.) Strazewski also asked for: a copy of the charge that PFAC filed with the Board regarding the alleged surveillance; an unredacted copy of the police report that Vallera filed; a copy of the photograph that Vallera showed her nanny; and the opportunity to interview Vallera's nanny. (Tr. 205, 434; CP Exh. 4, pp. 9–10.)

On June 11, Silver provided Strazewski with a copy of the Board charge that included the alleged surveillance at Vallera's home. (GC Exhs. 84(a)–(c).) Silver also expressed the Union's concerns about the ongoing investigation of Vallera for misconduct. First, Silver asserted that the College was using the investigation process to retaliate against Vallera for alleging that the College engaged in unlawful surveillance in the amended charge that PFAC filed with the Board in Case 13–CA–076794. Second, Silver objected to the fact that the College was not conducting the investigation under either of its existing policies related to employee conduct, and instead was following an unwritten procedure that did not give Vallera notice of any rule violation and relied on second-hand reports about union meetings as evidence for the investigation. And third, Silver objected to Strazewski's efforts to determine whether Vallera's nanny's identification of employee P.D. was true or false, because that inquiry was "beyond the ability or scope" of Strazewski's investigation. In light of those concerns, Silver urged Strazewski to drop the investigation of Vallera. (GC Exh. 84(a).)

Meanwhile, Strazewski asked Vallera to provide him with additional information, including the name of the employee who may have been conducting surveillance of Vallera's home, and/or the photograph that Vallera's nanny reviewed to make her identification. (GC Exh. 85(a).) When Vallera complied and advised Strazewski that her nanny identified employee P.D. as the man who was taking pictures at Vallera's home, on June 25, 2012, Strazewski requested a followup interview with Vallera to address "some significant questions and concerns." (GC Exh. 86.) Silver objected to Strazewski's request for another interview, citing the union's concerns about the investigation and how it was being conducted. Strazewski did not respond to Silver's concerns, and thus no followup meeting occurred. (Tr. 230, 448; GC Exhs. 87(a), 88; see also GC Exh. 87(b).)

h. Strazewski and Marcus recommend that Vallera be disciplined for misconduct

On August 9, Strazewski and Marcus submitted a report to Love with their findings and recommendations regarding the complaint of misconduct against Vallera. In the report, Marcus and Strazewski explained that they "reviewed PFAC publications, including member newsletters and public postings on the union Facebook pages. The publications documented that the accusation of surveillance had been communicated widely and was accepted as accurate by union members who had repeated the claim online, citing by number a police report filed with the Evanston Police in late January." Marcus and Strazewski interviewed personnel from the College's general counsel and human resources offices (including employee P.D.),[62] and found no evidence that the College was involved in any surveillance at Vallera's home.

By contrast, Marcus and Strazewski found Vallera to be "evasive and difficult" during the investigation. Specifically, Marcus and Strazewski described Vallera's conduct during the investigation as follows:

> Vallera denied making the surveillance accusation until presented with documents to the contrary.[63] Vallera stated that there was an open police investigation; the police report is to the contrary. Vallera has failed to respond to a request for a follow-up interview subsequent to her email identifying [employee P.D.], thereby refusing to participate with this investigation through to its conclusion. Vallera failed to file a complaint with the College about the alleged surveillance, nor did she ask the College to investigate her allegations. Vallera did not explain why she would not provide access to her nanny or the photograph which she had shown to her nanny and claimed was of [employee P.D.].

Ultimately, Marcus and Strazewski found that Vallera committed misconduct by: filing a false police report; widely publishing the false accusations; falsely stating that there was an ongoing police investigation; refusing to cooperate with the Provost's office in its investigation of the misconduct charge; and giving false statements at the investigation interview. Accordingly, Marcus and Strazewski recommended that Vallera be censured for her misconduct and suspended from employment at the College for one semester (with further instances of this misconduct being cause for termination). (GC Exh. 101; see also Tr. 1104–1106.) Love agreed with the recommended discipline because she agreed that Vallera made a false charge of surveillance that was promulgated verbally and in writing.[64] (Tr. 495–496.)

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[62] Strazewski interviewed employee P.D. and credited employee P.D.'s explanation that he was working in his office when the alleged surveillance incident occurred at Vallera's home on January 30. (Tr. 1099, 1102-1103 (noting that employee P.D. provided Strazewski with work product that he completed on January 30).)

[63] Vallera maintained that her nanny (rather than Vallera) was the one who filed the police report, because Vallera's nanny was the one who had first-hand knowledge about the incident. (Tr. 224, 1101–1102; GC Exh. 85(b); see also Tr. 1175, 1186–1187 (Strazewski agreed that Vallera did not file the police report).)

[64] During trial, Love testified that Vallera wrote at least one of the documents that asserted that someone from the College conducted surveillance at her home. However, when Love was asked to identify such a document in the materials that the College provided pursuant to subpoena, she was not able to do so. (Tr. 496, 503–506.) Love also could not explain why she concluded that Vallera made a "false" police report, as opposed to a report that Vallera honestly believed but was erroneous (e.g., because Vallera's nanny mistakenly, but in good faith, identified employee P.D. as the man she saw taking pictures at Vallera's home). (Tr. 508–509.)

i. Love notifies Vallera that disciplinary action is forthcoming

On August 13, Love notified Vallera that the investigation of the complaint of misconduct was complete, and that Love wished to meet with her on August 17 pursuant to the collective-bargaining agreement to inform Vallera of the contemplated disciplinary action and the reason for it. (GC Exh. 89(a).) Love later postponed the meeting to August 24, and then canceled that meeting without scheduling an alternate meeting date. (GC Exhs. 89(b)–(c); see also Tr. 233, 437.)

3. Discussion and analysis

a. Did the College violate the Act by investigating Vallera for misconduct, or by issuing a notice to Vallera on May 14, 2012 that she was being investigated?

As previously noted, the Acting General Counsel contends that the College violated Section 8(a)(3), (4), and (1) of the Act when it began investigating Vallera for misconduct in April 2012, and when it issued a notice to Vallera on May 14, 2012, that she was being investigated. Since there is no dispute that the College took those steps because of the statements that Vallera and other PFAC members were making about the alleged surveillance that took place at Vallera's home, the "single motive" line of cases serves as the relevant case law for my analysis.

In a single-motive case where an employer is charged with discriminating against an employee because of the employee's protected concerted or union activities, the only issue is whether the employee's conduct lost the protection of the Act because the conduct crossed over the line separating protected and unprotected activity. *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. 63 Fed. Appx. 524 (D.C. Cir. 2003). Specifically, when an employee is disciplined or discharged for conduct that is part of the res gestae of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act. *Aluminum Co. of America*, 338 NLRB 20 (2002). In making this determination, the Board examines the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Fresenius USA Mfg.,* 358 NLRB 1261, 1264 (2012) (citing *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979)).

In this case, the Acting General Counsel did not assert that the College unlawfully disciplined Vallera for engaging in protected activities (nor could it, since the College has not, as of yet, imposed any discipline). Instead, the Acting General Counsel asserted that the College ran afoul of the Act merely by *investigating* Vallera for misconduct, and by notifying Vallera of the investigation. Those claims miss the mark. The Board's single-motive cases establish that an employer may discipline or discharge an employee if the employee engages in conduct that could have qualified as protected activity, but was sufficiently egregious to remove it from the Act's protection. See *Stanford Hotel*, 344 NLRB 558 (2005) (citing *Atlantic Steel Co.*, 245 NLRB at 816). Given that an employer may discipline an employee under those circumstances, it stands to reason that an employer also may investigate whether an employee should be disciplined for engaging in activity that lost the protection of the Act, assuming, of course, that the investigation is done for legitimate reasons. See *Fresenius USA Mfg.,* 358 NLRB 1261, 1263 (2012) (noting that the Board "has recognized that employers have a legitimate business interest in investigating facially valid complaints of employee misconduct"); *Bridgestone Firestone South Carolina*, 350 NLRB 526, 528 (2007) (interrogation of employee was lawful where it occurred as part of a legitimate investigation into whether the employee engaged in misconduct). Indeed, the employer's right to conduct an investigation under these circumstances is essential to the employer's ability to make an informed decision about whether the employee's conduct warrants disciplinary action.

With those principles in mind, I find that the College's decisions to investigate Vallera for misconduct and issue a notice to Vallera about the investigation were legitimate and lawful. The College received a complaint from its general counsel's office that raised two issues: (a) whether Vallera was maliciously spreading false information that an attorney from the general counsel's office had conducted surveillance at her home; and (b) whether, in the alternative, someone from the general counsel's office in fact did conduct surveillance at Vallera's home. The College understandably wished to get to the bottom of both of those issues, and it was therefore reasonable for the College to investigate the complaint against Vallera, and to notify Vallera of the investigation so she could present her side of the story. I therefore recommend that the allegations in paragraphs VI(c)–(d) of the complaint be dismissed.

b. Did the College unlawfully fail and refuse to respond to PFAC's May 17, 2012 information request?

An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration. Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. By contrast, information concerning extra-unit employees is not presumptively relevant, and thus relevance must be shown. *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011). The burden to show relevance is not exceptionally heavy, as the Board uses a broad, discovery-type standard in determining relevance in information requests. Id.

If a dispute about an information request centers around union requests for relevant but assertedly confidential information, the Board balances the union's need for the information against any legitimate and substantial confidentiality interests established by the employer. The party asserting confidentiality has the burden of proving that such interests exist and that they outweigh its bargaining partner's need for the information. Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation that would meet the needs of both parties. *A-1 Door & Building Solutions*, 356 NLRB 499, 501; *National Steel Corp.*, 335 NLRB at 748.

As described in the findings of fact, on May 17, 2012, Vallera's union representative sent an information request to the College to request (among other things): a copy of the complaint against Vallera; any supporting documentation associated with the complaint; information about the steps that the College would take to ensure that the investigation was neutral and impartial; a copy of the policy under which the complaint was initiated and processed; the names of the people initiating the complaint; and information about any previous complaints that the College's office of general counsel initiated, and how those complaints were resolved. In response, Strazewski provided his own paraphrased summary of the complaint, but did not provide PFAC with any other information in response to the information request because the College maintained that the investigation was confidential and did not appear to be directly related to union activities (though, contrary to that claim, he recognized Vallera's right to have a union representative assist her during the investigation). (FOF, sec. f, supra.)

Based on those facts, it is clear that, as alleged, since June 5, 2012, the College unlawfully failed and refused to provide PFAC with the information that it sought in its May 17, 2012 information request. Through its information request, PFAC sought information that was directly relevant to its role as the collective-bargaining representative of part-time faculty members (including Vallera), particularly given that Vallera faced an investigation that could lead to disciplinary action. See *Alcan Rolled Products*, 358 NLRB 37, 42 (2012) (finding that a union's request for the names of coworkers who complained about an employee was presumptively relevant to the union's efforts to represent the employee in a grievance proceeding). Moreover, although Strazewski maintained that he could not provide the requested information because of confidentiality concerns, that generalized concern fell short because "it is well established that an employer may not avoid its obligation to provide a union with requested information that is relevant to bargaining simply by asserting a confidentiality interest in the information." *National Steel Corp.*, 335 NLRB at 748. The College made no effort to work out an accommodation that would provide PFAC with the information that it needed while still addressing the College's concerns about confidentiality, and thus the College did not fulfill its obligations under the Act.[65]

Accordingly, I find that as alleged in paragraph VIII(c) of the complaint, the College violated Section 8(a)(5) and (1) of the Act by, since June 5, 2012, failing and refusing to respond to PFAC's May 17, 2012 information request.

c. Did the College violate the Act by notifying Vallera on August 13, 2012, that disciplinary action was forthcoming based on the investigation of alleged misconduct?

As previously noted, the Acting General Counsel alleged that the College violated the Act by investigating Vallera for alleged misconduct, and by notifying Vallera of that investigation. The Acting General Counsel did not allege that the College violated the Act when it later (on August 13, 2012) notified Vallera that based on its investigation, the College wanted Vallera to attend a meeting to advise her of contemplated disciplinary action and the reasons for that action.

It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. See *Pergament United Sales*, 296 NLRB 333, 335 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). That standard has been met here, since: (a) the parties fully litigated the entire investigation of Vallera by, among other things, presenting extensive evidence about the investigation, the rationale for the discipline that Strazewski and Marcus recommended, and Love's decision to accept their recom-mendation and contact Vallera to schedule a meeting about the discipline; and (b) the College's decision to contact Vallera about the contemplated discipline is closely related to its decision to investigate Vallera for misconduct. I therefore will consider whether the College violated Section 8(a)(3), (4), and (1) of the Act when it notified Vallera on August 13, 2012, that she needed to attend a meeting about the discipline that the College was contemplating based on its investigation.

Since the College sought to discipline Vallera based on its view that Vallera's statements about surveillance at her home were false and therefore unprotected, the pertinent question is whether Vallera's statements were sufficiently egregious to remove them from the protection of the Act. *Aluminum Co. of America*, 338 NLRB 20 (2002). In making this determination, the Board examines the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Fresenius USA Mfg.,* 358 NLRB 1261, 1264 (citing *Atlantic Steel Co.*, 245 NLRB at 816).

To the extent that Vallera commented publicly about the alleged surveillance at her home, she did so at one PFAC meeting, and two conferences/meetings with professional colleagues. She also limited her discussion to stating that a police report had been filed regarding surveillance at her home, and that the IEA was looking into the issue. Since none of those actions are egregious, both factors one and two of the *Atlantic Steel* framework support Vallera. The fourth factor, whether Vallera's statements were provoked, is neutral, since Vallera's remarks were not really an outburst, and since (on the other hand) she did not make her remarks in the heat of the moment in response to an unfair labor practice.

[65] In its brief, the College correctly observes that the Board, after balancing the interest of the Union in receiving relevant information to its representational duties against the confidentiality interests of the employer, at times has permitted the employer to withhold certain information to preserve confidentiality. (R. Posttrial Br. at 72–73 (citing, e.g., *Postal Service*, 306 NLRB 474, 477 (1992), a case in which the Board, after balancing the competing interests, agreed that the employer permissibly withheld information that would have revealed the identity of confidential informants who were involved in a criminal investigation).) In this case, the College flatly refused to work out any type of accommodation regarding its confidentiality concerns, and as a result unlawfully withheld information that would have been responsive to PFAC's information request and could have been disclosed without jeopardizing any legitimate confidentiality concerns.

Regarding the third factor, the College took the position at the conclusion of its investigation that Vallera should be disciplined because she filed a false police report and then widely publicized those false allegations to various college personnel.[66] However, even if one assumes, arguendo, that the College was correct in finding that its general counsel's office did not engage in surveillance at Vallera's home, it does not follow that Vallera's statements to the contrary were so egregious as to lose the protection of the Act. Indeed, as the Board has held, false and inaccurate employee statements are protected under the Act unless they are *knowingly* false or otherwise are malicious. *Central Security Services*, 315 NLRB 239, 243 (1994). Since the College did not demonstrate (through its investigation or otherwise) that Vallera's statements about the surveillance at her home were knowingly false (as opposed to, for example, inaccurate, but made in good faith), the nature of Vallera's statements weighs in Vallera's favor.

Considering the *Atlantic Steel* factors as a whole, I find that Vallera's statements about the alleged surveillance at her home were not sufficiently egregious to remove them from the protection of the Act. Vallera had a right under the Act to voice her good-faith concern that College personnel were responsible for the alleged surveillance, even if her suspicions were in fact incorrect. Since Vallera's statements about the surveillance incident were protected under the Act, it was unlawful for the College to notify Vallera that it was contemplating disciplinary action against her based on her statements.

I therefore find that the College violated Section 8(a)(3) and (1) of the Act when it notified Vallera on August 13, 2012, that it was contemplating disciplinary action against her because of her protected statements about alleged surveillance at her home.[67]

[66] To be sure, the College also based its decision to discipline Vallera on its findings that Vallera falsely stated that there was an ongoing police investigation, refused to cooperate with the Provost's office in its investigation of the misconduct charge, and gave false statements at the investigation interview. As an initial matter, I would be remiss if I did not point out that some, if not all, of this additional "misconduct" is rather dubious, insofar as: (a) Vallera' s alleged refusal to cooperate arose after the College unlawfully refused to provide Vallera and her representative with information about the investigation; and (b) some of the allegedly false statements were essentially disagreements between Strazewski and Vallera about semantics (such as whether Vallera or her nanny "filed" the police report).

More important, the additional reasons for the College's decision to discipline Vallera do not change the result here. Simply put, even if the additional misconduct that the College identified is valid, the fact remains that the College explicitly identified Vallera's protected statements about surveillance as one of its reasons for planning to discipline Vallera. See FOF, sec. h, supra.

[67] I do not find that the College sought to discipline Vallera based on her participation in the trial in Case 30–CA–018888, or because she cooperated with the Board in Cases 13–CA–073486, 13–CA–076794, 13–CA–078080, and 13–CA–081162. Accordingly, I do not find that the College violated Sec. 8(a)(4) of the Act.

I. Overall Bad-Faith Bargaining

1. Complaint allegations

The complaint alleges that by its overall conduct, Respondent has failed and refused to bargain in good faith with PFAC as the exclusive collective-bargaining representative of the bargaining unit. (GC Exh. 1(ff), par. XII (alleging violation of Sec. 8(a)(5) and (1).)

2. Findings of fact

In support of its allegation that the College engaged in overall bad-faith bargaining, the Acting General Counsel primarily asserted that the College: refused to meet and bargain with PFAC face to face; refused to provide PFAC with responses to PFAC's information requests in a timely manner; refused to bargain with PFAC about the effects of changes that the College was making to working conditions; unilaterally changed the scope of the bargaining unit; and repudiated the grievance procedure set forth in the collective-bargaining agreement. (GC Posttrial Br. at 4.)

My findings of fact and analysis concerning the alleged misconduct that the Acting General Counsel cited are set forth in other sections of this decision. In those sections, I found that the College did not violate the Act when it refused to bargain with PFAC about the effects of the College's prioritization process. I also found that the College did not unilaterally change the scope of the bargaining unit or repudiate the grievance procedure. (See secs. C and G, supra.) The Acting General Counsel's overall bad-faith bargaining allegation must therefore succeed or fail based on the remaining misconduct that the Acting General Counsel identified, along with any additional facts about the College's conduct at and away from the bargaining table. With that limitation in mind, I provide the following factual timeline:

January 2010	The College and PFAC begin negotiations for a successor collective bargaining agreement. Javier Ramirez, a mediator from the Federal Mediation and Conciliation Service, facilitates negotiations. [Sec. A(2)(a), supra.]
October 2010	The College submits a contract proposal that, inter alia, asks PFAC to waive its right to effects bargaining. PFAC objects, in part because it believes the proposal is retaliatory given that the parties just settled a case in which PFAC alleged that the College failed to engage in effects bargaining. The College admits that it added the effects bargaining waiver language because it does not want a dispute about effects bargaining to arise in the future. [Sec. A(2)(b).]
Early 2011	The parties continue negotiations and identify several areas of the contract that are not in dispute (NIDs), and therefore can be set aside at least until the parties have a complete working proposal in place. [Sec. A(2)(c).]

Summer 2011 The parties begin using a small group format for

negotiations. Leonard Strazewski joins the College's bargaining team, in preparation for replacing Louise Love as the lead negotiator. [Sec. A(2)(d).]

October 2011 The College receives a copy of the complaint that the Acting General Counsel filed in Case 30–CA–18888. At the next bargaining session, the College resubmits its March 2011 contract proposal for consideration, even though that proposal did not include any of the NIDs that the parties had identified in the preceding months.

When Vallera questions the College about the reason for making what she views as a regressive proposal, the College asserts that Vallera violated the small group negotiation guideline that discussions in those sessions are off the record.

The Federal mediator withdraws after the parties are unable to agree on a process for future bargaining sessions. [(Sec. A(2)(e).]

November 2011 The College notifies PFAC that it will provide

PFAC with a new contract proposal in December 2011. Accordingly, the College states that the parties do not need to meet until after PFAC has an opportunity to review and respond to the new proposal. [Sec. A(2)(f).]

December 2011 The College sends its new contract proposal to

PFAC. Among other changes, the new proposal explicitly states that PFAC waives its right to effects bargaining, and does not include many of the NIDs that the parties identified earlier in 2011. [Sec. A(2)(g).]

Vallera sends the College an information request about its Early Feedback System. [Sec. E(2)(b).]

Vallera asks the College to bargain about the impact and effects of its decision to reduce the credit hours awarded for certain courses. [Sec. B(2)(d).]

February 2012 Vallera asks the College for dates to resume face-to-face negotiations for a successor collective-bargaining agreement, and states that PFAC wishes to pick up negotiations from where the parties left off in October 2011.

Strazewski replies that PFAC should either respond to the College's December 2011 contract proposal or make a counterproposal. [Sec. A(2)(h).]

The College fails and refuses to respond to part of Vallera's December 2011 information request about its Early Feedback System. [Sec. E(2)(c).]

An arbitrator rules in employee R.P.'s case that part-time faculty members are only employees of the College during semesters when they are teaching, and therefore do not have standing to question their future employment. [Sec. B(2)(e).]

The College advises Vallera that it will meet with PFAC about the changes that it made to course credit hours if PFAC first provides the College with information to indicate which PFAC members were affected by the changes. [Sec. B(2)(f).]

Spring 2012 The parties continue their bargaining standoff, with PFAC demanding that the College resume face-to-face negotiations, and the College demanding that PFAC respond to the College's December 2011 proposal before any face-to-face meetings occur. [Sec. A(2)(h).]

May 2012 The College notifies PFAC that it is willing to meet to discuss the effects of the changes that the College made to course credit hours. [Sec. B(2)(f).]

Vallera sends the College an information request about faculty class assignments for fall 2012. [Sec. F(2)(l).]

Vallera sends the College an information request about the College's investigation of her for misconduct. [Sec. H(2)(f).]

June 2012 The College refuses to provide information in response to Vallera's May 2012 information request about the College's investigation of her for misconduct. [Sec. H(2)(f).]

The College agrees to resume face-to-face bargaining sessions regarding a successor collective-bargaining agreement, and regarding the effects of the changes that the College made to course credit hours. [Secs. A(2)(i), B(2)(f).]

July 2012 PFAC renews its request for information about

faculty class assignments for fall 2012. [Sec. F(2)(m).]

September 2012 The College provides PFAC with information

in response to PFAC's May 2012 information request about faculty class assignments for fall 2012. [Sec. F(2)(m).]

As stated elsewhere in this decision, I have found that the College violated Section 8(a)(5) and (1) of the Act by: (a) failing and refusing to meet and bargain with PFAC from February 16 to June 13, 2012, regarding a successor collective-bargaining agreement (sec. A(3), supra); (b) failing and refusing to bargain with PFAC about the impact and effects of College's implementation of course credit hour reductions in several departments (sec. B(3), supra); (c) failing and refusing to respond to PFAC's information requests about the Early Feedback System and the College's investigation of Vallera for misconduct (secs. E(3), H(3)(b), supra); and (d) unreasonably delaying in responding to PFAC's information request about faculty class assignments for fall 2012 (sec. F(3)(c), supra).[68]

3. Discussion and analysis

Section 8(d) of the Act defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Good-faith bargaining presupposes a desire to reach ultimate agreement to enter into a collective bargaining contract. *Public Service Co. of Oklahoma*, 334 NLRB 487, 487–488 (2001) (citing *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 485 (1960)), enfd. 318 F.3d 1173 (10th Cir. 2003).

In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. From the context of an employer's total conduct, it must be decided whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining. An inference of bad-faith bargaining is appropriate when the employer's proposals, taken as a whole, would leave the union and the employees it represents with substantially fewer rights and less protection than provided by law without a contract. In such circumstances, the union is excluded from the participation in the collective-bargaining process to which it is statutorily entitled, effectively stripping it of any meaningful method of representing its members in decisions affecting important conditions of employment and exposing the employer's bad faith. *Public Service Co. of Oklahoma*, 334 NLRB at 487–488.

Finally, it is axiomatic that under the NLRA neither the Board nor the courts may compel concessions or otherwise sit in judgment upon the substantive terms of collective-bargaining agreements. However, enforcement of the obligation to bargain collectively is crucial to the NLRA statutory scheme. *Public Service Co. of Oklahoma*, 334 NLRB at 488 (citing *NLRB v. American National Insurance Co.,* 343 U.S. 395, 402–404 (1952)). Therefore, to the extent that I examine the Respondent's proposals in this proceeding, my purpose is not to determine their merits, but instead to determine whether in combination and by the manner proposed they evidence an intent not to reach agreement. Id. (citing *Coastal Electric Cooperative*, 311 NLRB 1126, 1127 (1993)).

In this case, the evidentiary record shows that within days of learning in October 2011 that the Board filed a complaint against it in Case 30–CA–018888, the College abruptly decided to resubmit its March 30, 2011 contract proposal. In so doing, the College discarded 6 months of productive bargaining with PFAC (including the NIDs that the parties identified), save for the instances where PFAC agreed to language that was in the March 30 proposal. When Vallera understandably challenged the College's decision, the College asserted that Vallera violated the ground rules for small group negotiations, and the College then ceased all face-to-face bargaining to prepare a revised contract proposal. The proposal that the College submitted in December 2011, however, was largely similar to the College's March 2011 proposal, except that the College amplified its demand that PFAC waive its right to effects bargaining, and eliminated the instructional continuity clause from the contract. And, when PFAC approached the College to resume face-to-face negotiations for a successor collective-bargaining agreement (and to request effects bargaining about the reductions that the College made to the credit hours awarded for certain courses), the College unlawfully insisted that PFAC first meet preconditions before the College would agree to such bargaining.

The evidentiary record supports a finding that the College engaged in a course of overall bad-faith bargaining. First, the College presented PFAC with regressive contract proposals in October and December 2011 that retaliated against PFAC for protected activity in the form of litigating the charges in the complaint in Case 30–CA–018888.[69] Indeed, the College submitted its October 2011 regressive proposal within days of receiving the complaint, and offered no explanation for why it

[68] I also, of course, found that the College violated Sec. 8(a)(3) and (1) of the Act when it did not assign Vallera a second class to teach for the fall 2012 semester, and when the College notified Vallera that it was contemplating disciplinary action against her because of her protected statements about alleged surveillance at her home. Based on the facts of this case, however, those findings are not probative on the question of whether the College engaged in overall bad-faith bargaining.

[69] It should be noted that the College engaged in similar retaliatory conduct in October 2010. Specifically, in October 2010, the College demanded for the first time in a contract proposal that PFAC waive its right to effects bargaining. When questioned about its rationale for that demand, the College referenced the recent settlement that PFAC obtained regarding the College's failure to bargain about the effects of credit hour changes in the photography department, and stated that it did not want to go through a similar dispute in the future. While I do not rely heavily on the events of 2010 for my analysis and findings, I note that the Board has recognized that when bad-faith is at issue, the violation does not occur at a precise point in time, and it may not become apparent until long after negotiations began that negotiations were in bad faith from the inception. *Regency Service Carts*, 345 NLRB 671, 676 fn. 14 (2005).

was returning to an outdated proposal that did not incorporate any of the progress that the parties made in their negotiations.[70] The Board has held that regressive proposals that are retaliatory and/or lack justification are evidence of bad faith. *Whitesell Corp.*, 357 NLRB 1119, 1179 (2011) (finding of bad faith established in part by evidence that respondent was committed to forcing employees to accept worse contract terms in retaliation for the union's success in requiring the employer to rescind an unlawfully imposed contract); *Quality House of Graphics*, 336 NLRB 497, 515 (2001) (finding that the timing of the employer's bargaining proposal, the lack of justification for the proposal, and the proposal's drastic and unprecedented nature suggested that the employer was bargaining in bad faith and with an aim of retaliating against the union for pursuing charges that led to the complaint before the Board).

Second, when the College presented PFAC with its December 2011 contract proposal, it made it clear that it wanted PFAC to agree to contract language that would constitute a clear and unmistakable waiver of PFAC's right to effects bargaining. Without a contract, of course, the College would be obligated under the Act to notify and bargain with PFAC about any changes that it wished to make to the terms and conditions of PFAC bargaining unit members. *Public Service Co. of Oklahoma*, 334 NLRB at 498. By insisting on contract language that would have PFAC and its members waive their right to engage in both decisional and effects bargaining concerning virtually all terms and conditions of employment, and thereby leave PFAC members with substantially fewer rights and less protection than they would have under the Act without a contract, the College engaged in bargaining that demonstrated an intent to frustrate the possibility of arriving at any agreement.[71] *Whitesell Corp.*, 357 NLRB 1119, 1121 (employer frustrated bargaining by insisting on retaining control over a broad range of mandatory subjects); *Public Service Co. of Oklahoma*, 334 NLRB at 501 (employer engaged in bad-faith bargaining by insisted during negotiations that it have the right to change all aspects of the bargaining unit's terms and conditions of employment without interference from the union).

And third, when the time arose for the parties to resume negotiations (or start negotiations, as to the effects of course credit hour reductions), the College unlawfully refused to participate in face-to-face negotiations until PFAC first satisfied preconditions set by the College. (See secs. A(3), B(3), supra.) Because of the College's preconditions, the parties did not meet face to face to bargain about a successor collective-bargaining agreement from February 16 to June 13, 2012. Similarly, because of the College's preconditions, the parties did not engage in effects bargaining about course credit hour reductions from February 21 to May 4, 2012. Thus, by setting preconditions to face-to-face bargaining, the College frustrated the parties' efforts to reach an agreement, and thereby engaged in bad-faith bargaining. See *Whitesell Corp.*, 357 NLRB 1119, 1121 (explaining that the employer obstructed negotiations when it notified the union that it would not schedule additional bargaining sessions until the union first provided proof of its intent to come to an agreement).

In sum, viewing the College's conduct in its totality, I find that the College did engage in overall bad-faith bargaining as alleged in paragraph XII of the complaint. Indeed, by making contract proposals that were retaliatory and that lacked justification, insisting on a management-rights clause that would leave PFAC members with substantially fewer rights than they would have under the Act, and engaging in delaying tactics by setting unlawful preconditions to face-to-face bargaining, the College demonstrated an intent to frustrate the possibility of reaching any agreement.

CONCLUSIONS OF LAW

1. By failing and refusing to meet and bargain with PFAC since February 16, 2012, regarding a successor collective-bargaining agreement, the College violated Section 8(a)(5) and (1) of the Act.

2. By failing and refusing to bargain with PFAC about the impact and effects of the College's implementation of its decision to reduce the number of credit hours awarded for 10 courses (Accounting; Screenwriting Workshop; Adaptation in LA; Acquiring Intellectual Property/LA; Theory, Harmony & Analysis I; Theory, Harmony & Analysis II; Directing I; Pro Survival & How to Audition; Local Government Politics Seminar; and State and National Government Politics Seminar) since February 21, 2012, the College violated Section 8(a)(5) and (1) of the Act.

3. By, since December 8, 2011, maintaining an overbroad work rule (the Network and Computer Use Policy) that interferes with, restrains, and coerces employees in the exercise of rights guaranteed by Section 7 of the Act, the College violated Section 8(a)(1) of the Act.

4. By, since February 17, 2012, failing and refusing to provide PFAC with certain information that PFAC requested about the College's unilateral implementation of its Early Feedback System, the College violated Section 8(a)(5) and (1) of the Act.

5. By, in or about March 2012, failing and refusing to assign more than one class section to Diana Vallera for the fall 2012 semester because she engaged in union and protected concerted activities, the College violated Section 8(a)(3) and (1) of the Act.

6. By, since May 13, 2012, failing and refusing to provide PFAC with certain information that PFAC requested about the College's assignments of classes to part-time faculty in the photography department for fall 2012, the College violated Section 8(a)(5) and (1) of the Act.

[70] At trial, Strazewski asserted that the College prepared its December 2011 proposal because the language in prior proposals was ambiguous, and because the College wanted PFAC to respond to concrete proposed contract language. (See sec. A(2)(f), supra.) Those explanations are not persuasive because they do not explain or offer justification for why the December 2011 proposal was regressive in nature.

[71] I have considered the fact that the College's request for an effects bargaining waiver was not new, given that the College requested such a waiver as far back as October 2010. The October 2010 request, however, was made in retaliation for PFAC's protected activity. Moreover, the evidentiary record indicates that after October 2010, the parties tabled that issue and focused their negotiations on other parts of the contract. The College, therefore, essentially revived the effects bargaining waiver as a prominent and live issue when it included more explicit effects bargaining waiver language in its December 2011 contract proposal.

7. By, since June 5, 2012, failing and refusing to provide PFAC with certain information that PFAC requested concerning the nature of and basis for the College's investigation of Diana Vallera for misconduct, the College violated Section 8(a)(5) and (1) of the Act.

8. By notifying Diana Vallera on or about August 13, 2012, that the College planned to discipline her for engaging in union and protected concerted activities (specifically, for telling others about her belief that the College engaged in surveillance of her home), the College violated Section 8(a)(3) and (1) of the Act.

9. By failing and refusing to bargain in good faith with PFAC, as demonstrated by the College's overall conduct in 2011–2012, the College violated Section 8(a)(5) and (1) of the Act.

10. By committing the unfair labor practices stated in Conclusions of Law 1–9 above, the College engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the Act.

11. I recommend dismissing the complaint allegations that are not addressed in the conclusions of law set forth above.

REMEDY

A. Traditional Remedies

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having unlawfully refused to assign Diana Vallera a second class to teach in the fall 2012 semester for discriminatory reasons, must make her whole for any loss of earnings and other benefits that resulted from that decision. Backpay for this violation shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

Regarding Respondent's failure to bargain with PFAC about the effects of its decision to reduce the number of credit hours awarded for 10 courses, I will order Respondent to bargain with PFAC about that issue.[72] In addition, to restore some measure of economic strength to PFAC and recreate a measure of balanced bargaining power, I will order a limited backpay remedy designed to make bargaining unit members whole for any losses they suffered as a result of Respondent's failure to bargain about the effects of its decision to reduce credit hours for the 10 courses identified in the conclusions of law. Specifically, for each bargaining unit member who taught one of the 10 courses after the credit hours were reduced, Respondent shall pay backpay at the rate of their normal wages for the affected course(s) from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) Respondent bargains to agreement with PFAC about credit hour reductions for the 10 courses; (2) the parties reach a bona fide impasse in bargaining; (3) PFAC fails to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 days after receipt of Respondent's notice of its desire to bargain with PFAC; or (4) PFAC subsequently fails to bargain in good faith. In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which course credit hours were reduced to the time they secured equivalent employment elsewhere, or the date on which Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages before Respondent reduced course credit hours. See *Smurfit-Stone Contractor Enterprises*, 357 NLRB 1732, 1736–1737 (2011) (citing *Transmarine Navigation Corp.*, 170 NLRB 389 (1968)). Backpay shall be based on earnings that the affected employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

For all backpay required herein, Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

B. Special Remedies

In addition to the remedies that I have discussed above, the Acting General Counsel and/or PFAC request that I impose the following special remedies in this case: (a) a broad remedial order; (b) bargaining expenses; (c) litigation expenses; (d) a bargaining order with specific timelines and reporting requirements; (e) an order requiring Respondent to notify PFAC and provide PFAC an opportunity to bargain about "all future changes affecting the union with regard to course scheduling and assignment"; (f) an order requiring Respondent to honor all NIDs that the parties identified; and (g) an order requiring Respondent to pay, or otherwise arrange, for a full page advertisement in the Columbia Chronicle (a student-run newspaper at the College) that will include a copy of the Notice that will issue in this case. (GC Posttrial Br. at 75-80; CP Posttrial Br. at 67-68.) As described in more detail below, I do not find that any of the requested special remedies are warranted, and therefore decline to impose them.

1. Broad remedial order

The Acting General Counsel and PFAC have requested that I issue a broad remedial order in this case. The Board has stated that "a broad cease-and-desist order enjoining a respondent

[72] PFAC also requested that I order Respondent to engage in effects bargaining about the Early Feedback System. (CP Posttrial Br. at 69–70.) I decline that request because the complaint did not allege that, and the parties did not litigate whether, Respondent failed to engage in effects bargaining regarding its decision to implement the Early Feedback System.

from violating the Section 7 rights of employees 'in any other manner,' is warranted 'when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights.'" *Five Star Mfg.*, 348 NLRB 1301, 1302 (2007) (citing *Hickmott Foods*, 242 NLRB 1357, 1357 (1979), enfd. 278 Fed. Appx. 697 (8th Cir. 2008)). In either situation, the Board reviews the totality of circumstances to ascertain whether the respondent's specific unlawful conduct manifests an attitude of opposition to the purposes of the Act to protect the rights of employees generally, which would provide an objective basis for enjoining a reasonably anticipated future threat to any of those Section 7 rights. Id.

I do not find that Respondent has shown a proclivity to violate the Act. Nor do I find that Respondent has engaged in egregious or widespread misconduct that demonstrates a general disregard for employees' fundamental statutory rights. The majority of the violations that Respondent has committed in recent history (including this case and Case 30–CA–018888) have been failures to comply with information requests, setting unlawful preconditions to bargaining, and failures to engage in effects bargaining after making material changes to the terms and conditions of employment. Any future misconduct of that nature (or, for that matter, any future overall bad-faith bargaining), however, would be in violation of a narrow order directing Respondent to cease and desist from violating the Act "in any like or related manner," and subject to contempt proceedings. See *Hospital San Cristobal*, 358 NLRB 769, 769 fn. 2 (2012).

More generally, reviewing the totality of circumstances, I find that while Respondent did violate the Act, it did not engage in conduct that manifests an attitude of opposition to the Act and its purposes. The bargaining relationship between Respondent and PFAC is a strained one, but it is not beyond repair, as demonstrated by the fact that the parties have shared periods of cooperative and productive negotiations, including, but not limited to, early 2011, when the parties worked with a Federal mediator and identified several NIDs. A broad remedial order is therefore not warranted at this time.

2. Bargaining expenses

The Board has a "long established practice of relying on bargaining orders to remedy the vast majority of bad-faith bargaining violations," specifically by relying on the combination of bargaining orders, a customary cease-and-desist order and the posting of a notice to "induce a respondent to fulfill its statutory obligations." *Whitesell Corp.*, 357 NLRB 1119, 1122 (2011) (citing *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995)). However, in "cases of unusually aggravated misconduct . . . where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies, . . . an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table." Id. (citations omitted); see also *Santa Barbara New Press*, 358 NLRB 1415, 1417 (2012).

After considering the facts of this case, I do not find that respondent engaged in "unusually aggravated misconduct" that would warrant an award of bargaining expenses. As I have found, Respondent did engage in some serious misconduct, including insisting that PFAC agreed to waive its right to effects bargaining, making regressive proposals in retaliation for PFAC's protected activity, and setting unlawful preconditions to bargaining. I cannot find, however, that Respondent's misconduct was so aggravated as to infect the bargaining process to the point where traditional remedies would not be effective. Indeed, when the Board has awarded bargaining expenses, it has been able to cite misconduct well beyond that which the Respondent engaged in here. See, e.g., *Santa Barbara New Press*, 358 NLRB 1415, 1417–1418 (bargaining expenses award based not only on the respondent's insistence on a broad management-rights clause, but also the insistence on the right to unilaterally identify disciplinary offenses and the appropriate level of discipline, as well as the respondent's misconduct away from the bargaining table that demonstrated a calculated strategy to reduce negotiations to a sham); *Whitesell Corp.*, 357 NLRB 1119, 1122 (same, where the respondent insisted on unilateral control over a broad range of mandatory subjects, repeatedly asserted that the parties were at impasse despite the union's concessions, refused to agree to a union recognition clause, made regressive and retaliatory contract proposals, threatened future regressive proposals if the union did not accede to its demands, and set unlawful preconditions to future meetings). Respondent's misconduct, while serious, falls short of the aggravated level required to justify an award of bargaining expenses.

3. Litigation expenses

The Board has stated that an order requiring a respondent to reimburse a union for litigation expenses is appropriate only where the defenses raised by the respondent are frivolous, rather than debatable. A respondent's defenses will be considered debatable if they turn on issues of credibility. *Whitesell Corp.*, 357 NLRB 1119, 1185 (2011) (citing *Frontier Hotel & Casino*, 318 NLRB at 860). In addition, the Board has denied reimbursement of litigation costs in cases where some of the complaint allegations were dismissed, a fact that undermined the claim that the respondent's defenses were frivolous. *Frontier Hotel & Casino*, 318 NLRB at 860, enfd. 118 F.3d 795 (D.C. Cir. 1997).

As my decision in this case demonstrates, Respondent's defenses in this case were not frivolous. Respondent and I saw eye to eye on several complaint allegations that I recommended be dismissed. Further, for the violations that I found, Respondent presented good-faith, debatable arguments about the credibility of witnesses and how I should interpret the parties' actions during negotiations and concerning employment decisions. It would not be appropriate for me to penalize Respondent with an award of litigation expenses merely for asserting its right to defend itself in good faith in these proceedings.

4. Scope of bargaining order

As part of the bargaining order that I will issue in this case, the Acting General Counsel requests that I order Respondent to: bargain on request within 15 days of my order; bargain for a minimum of 4 hours per week until the parties reach an agreement or a valid impasse; and prepare bargaining reports every 15 days, and submit those reports to the Regional Director and PFAC for review. (GC Posttrial Br. at 75.) There is no support, however, for those remedies in the Board's case law. See *Myers Investigative & Security Services*, 354 NLRB 367, 368 fn. 2 (2009) (rejecting bargaining order language that would have required respondent to meet with the union at least 24 hours per month, and at least 6 hours per session); *Monmouth Care Center*, 354 NLRB 11, 11 fn. 3 (2009) (rejecting bargaining order language that directed respondents to bargain jointly with the union once a week). Seeing no basis for extraordinary remedies here, I will direct Respondent to comply with a traditional bargaining order.

5. Requirement that the College bargain with PFAC about all future changes affecting PFAC regarding course scheduling and assignment

The Acting General Counsel asks that I order the College to bargain with PFAC about all future changes affecting PFAC regarding course scheduling and assignment. (GC Posttrial Br. at 75.) I do not believe that such an order is appropriate. As a preliminary matter, the Acting General Counsel requests an order that is arguably overbroad insofar as it would require effects bargaining for any changes relating to course scheduling and assignment, regardless of whether the changes might be de minimis in nature. Beyond that issue, I find that the cease and desist order that I will issue in this case is sufficient, particularly when coupled with the coverage of the Act itself and the fact that the door to the courthouse remains open should effects bargaining disputes arise in the future.

6. Requirement that Respondent honor all NIDs

PFAC requests that I order Respondent to honor all NIDs that the parties identified in 2011 before negotiations deteriorated. (CP Posttrial Br. at 67.) Once again, I do not find that such an order would be appropriate.

As noted above, I did find that Respondent engaged in bad-faith bargaining when it submitted regressive and retaliatory contract proposals in October and December 2011 that, among other things, disregarded all NIDs that the parties had identified in the preceding months. It does not follow, however, that I should order Respondent to honor all NIDs in future negotiations, particularly when Respondent has consistently maintained that all NIDs remain open for further negotiation (particularly once the parties create and begin reviewing a complete draft agreement). Indeed, the parties and the Federal mediator came up with the term NID precisely because NIDs were not meant to rise to the level of tentative agreements. I see no basis for me to redefine the terms that the parties worked out during their negotiations.

7. Full-page notice posting in student-run newspaper

Finally, in addition to the customary notice posting requirements, the Acting General Counsel requested that I also require Respondent to arrange for the notice to be printed in the Columbia Chronicle, a student-run newspaper at the College. The Board has required such a notice posting in the past, but only in cases where the respondent's "unfair labor practices are so numerous, pervasive, and outrageous that special notice and access remedies are necessary to dissipate fully the coercive effects of the unfair labor practices found." *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995); see also *Dynatron/Bondo Corp.*, 324 NLRB 572, 572 fn. 4, 586 (1997), enfd. in pertinent part 176 F.3d 1310 (11th Cir. 1999). For the reasons that I have stated elsewhere in this remedy section, I find that Respondent's conduct, while serious, does not rise to the level of warranting the extraordinary remedy of requiring Respondent to post a full-page copy of the notice in the student-run newspaper.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[73]

ORDER

The Respondent, Columbia College Chicago, located in Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to bargain in good faith with the Part-Time Faculty Association at Columbia (the Union) as the exclusive collective-bargaining representative of its part-time faculty at its facility in Chicago, Illinois.

(b) Making regressive contract proposals that retaliate against the Union and its members for exercising their under Section 7 of the Act.

(c) Insisting on contract proposals that essentially give Respondent unfettered control over a broad range of mandatory subjects of bargaining, including the effects of decisions regarding those mandatory subjects of bargaining.

(d) Setting unlawful preconditions that the Union must satisfy before Respondent will engage in face to face bargaining or effects bargaining.

(e) Failing or refusing to bargain in good faith with the Union about the effects of Respondent's decision to reduce the number of credit hours awarded for certain courses.

(f) Failing to provide, or unreasonably delaying in providing, information requested by the Union that is relevant and necessary for the Union to fulfill its role as the exclusive collective-bargaining representative of unit employees.

(g) Maintaining the current version of its Network and Computer Use Policy, which sets forth an overbroad work rule that unit members reasonably would construe as prohibiting Section 7 activity.

(h) Notifying unit members that they face forthcoming disciplinary action because they engaged in Section 7 activity.

(i) Discriminating against unit members in teaching assignments because they engaged in Section 7 activity.

[73] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(j) In any like or related manner interfering with, restraining, or coercing unit members in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment, and concerning the effects of Respondent's decision to reduce the number of credit hours awarded for the following 10 courses: Accounting; Screenwriting Workshop; Adaptation in LA; Acquiring Intellectual Property/LA; Theory, Harmony & Analysis I; Theory, Harmony & Analysis II; Directing I; Pro Survival & How to Audition; Local Government Politics Seminar; and State and National Government Politics Seminar; if understandings are reached, embody the understandings in signed agreements:

> [A]ll part-time faculty members who have completed teaching at least one semester at Columbia College Chicago, excluding all other employees, full-time faculty, artists-in-residence, and Columbia College Chicago graduate students, part-time faculty members teaching only continuing education, music lessons to individual students or book and paper making classes, Columbia College Chicago full-time staff members, teachers employed by Erickson Institute, the YMCA or Adler Planetarium, and other individuals not appearing on the Columbia College Chicago payroll, managers and confidential employees, guards, and supervisors as defined in the Act.

(b) Make any unit members who taught the 10 courses for which the College reduced credit hours starting in 2011 whole for any loss of earnings and other benefits suffered as a result of Respondent's failure to engage in effects bargaining, in the manner set forth in the remedy section of the decision.

(c) Make Diana Vallera whole for any loss of earnings or other benefits suffered as a result of the discrimination against her regarding fall 2012 teaching assignments in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to Respondent's notice to Diana Vallera that Respondent was contemplating disciplining her for engaging in protected activity by telling others about her belief that Respondent conducted surveillance at her home, and within 3 days thereafter notify the Diana Vallera in writing that this has been done and that the unlawful notice and the documentation on which it was based will not be used against her in any way.

(e) To the extent that it has not yet done so, provide the Union with the information that the Union requested in the following information requests: December 20, 2011 (Early Feedback System); May 13, 2012 (fall 2012 faculty class assignments); and May 17, 2012 (investigation of Diana Vallera for misconduct).

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix."[74] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2011.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 15, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to bargain in good faith with the Part-Time Faculty Association at Columbia (the Union) as the

[74] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

exclusive collective-bargaining representative of the College's part-time faculty at the College's facility in Chicago, Illinois.

WE WILL NOT make regressive contract proposals that retaliate against the Union and its members for exercising their rights under Section 7 of the Act.

WE WILL NOT insist on contract proposals that essentially give the College unfettered control over a broad range of mandatory subjects of bargaining, including the effects of decisions regarding those mandatory subjects of bargaining.

WE WILL NOT set unlawful preconditions that the Union must satisfy before the College will engage in face-to-face bargaining or effects bargaining.

WE WILL NOT fail or refuse to bargain in good faith with the Union about the effects of the College's decision to reduce the number of credit hours awarded for certain courses.

WE WILL NOT fail to provide, or unreasonably delay in providing, information requested by the Union that is relevant and necessary for the Union to fulfill its role as the exclusive collective-bargaining representative of unit employees.

WE WILL NOT maintain the current version of the College's Network and Computer Use Policy, which sets forth an overbroad work rule that unit members reasonably would construe as prohibiting Section 7 activity.

WE WILL NOT notify unit members that they face forthcoming disciplinary action because they engaged in Section 7 activity.

WE WILL NOT discriminate against unit members in teaching assignments because they engaged in Section 7 activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce unit members in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment, and concerning the effects of the College's decision to reduce the number of credit hours awarded for the following 10 courses: Accounting; Screenwriting Workshop; Adaptation in LA; Acquiring Intellectual Property/LA; Theory, Harmony & Analysis I; Theory, Harmony & Analysis II; Directing I; Pro Survival & How to Audition; Local Government Politics Seminar; and State and National Government Politics Seminar; if understandings are reached, embody the understandings in signed agreements:

> [A]ll part-time faculty members who have completed teaching at least one semester at Columbia College Chicago, excluding all other employees, full-time faculty, artists-in-residence, and Columbia College Chicago graduate students, part-time faculty members teaching only continuing education, music lessons to individual students or book and paper making classes, Columbia College Chicago full-time staff members, teachers employed by Erickson Institute, the YMCA or Adler Planetarium, and other individuals not appearing on the Columbia College Chicago payroll, managers and confidential employees, guards, and supervisors as defined in the Act.

WE WILL make any unit members who taught the 10 courses for which the College reduced credit hours starting in 2011 whole for any loss of earnings and other benefits suffered as a result of the College's failure to engage in effects bargaining, plus interest compounded daily.

WE WILL make Diana Vallera whole for any loss of earnings or other benefits suffered as a result of the discrimination against her regarding fall 2012 teaching assignments, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Diana Vallera and the unit members who taught the 10 courses for which the College reduced credit hours for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the College's notice to Diana Vallera that the College was contemplating disciplining her for engaging in protected activity by telling others about her belief that the College conducted surveillance at her home, and within 3 days thereafter notify Diana Vallera in writing that this has been done and that the unlawful notice and the documentation on which it was based will not be used against her in any way.

WE WILL, to the extent that we have not yet done so, provide the Union with information in response to the following information requests: December 20, 2011 (Early Feedback System); May 13, 2012 (fall 2012 faculty class assignments); and May 17, 2012 (investigation of Diana Vallera for misconduct).

COLUMBIA COLLEGE CHICAGO